Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY A. BASILE,

Petitioner,

against

TOWN OF SOUTHAMPTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state or municipality, as a matter of law, designate a property wetlands and, by its regulations, destroy the value of the property, then acquire it by condemnation and take advantage of its actions by paying a minimal amount because it had destroyed the value?

2. Does this Court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992), preclude a purchaser who acquires property after laws or regulations are adopted from challenging the constitutionality of those laws or regulations as applied to that property?

3. Does a covenant by a property owner which provides that no structure shall be erected on the property unless and until the property is approved as a building lot by the municipality, permit the municipality, upon application being made, to deny to the property, all economically viable, beneficial or productive uses?

NOTICE OF RELATED CASES

On the same day and at the same time that the Court of Appeals for the State of New York decided this case, the Court also rendered opinions in *Kim v. The City of New York,* 2 No. 8, 1997 WL 58593, 65 USWL 2541, (N.Y. Feb. 18, 1997), *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry,* 2 No. 9, 1997 WL 68232 (N.Y. Feb. 18, 1997), and *Gazza v. New York Department of Environmental Conservation,* 2 No. 10, 1997 WL 68590 (N.Y. Feb. 18, 1997).

The common issue in the related cases is that the New York court held, in each case, that where laws or regulations amount to a taking of property without just compensation so that owners would have the right to challenge those laws or regulations, that right is lost upon the transfer of the property to another. None of the parties in the four cases are related. Separate petitions for writs of certiorari are being filed in each case.

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PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

OPINIONS BELOW

The opinion of the Court of Appeals to be reported at ___N.Y.2d___, ___N.E.2d___, ___N.Y.S.2d___ (1997), appears at Appendix A. (p. A-1) The Court of Appeals order granting leave to appeal, reported at ___N.Y.2d___, ___N.E.___, ___N.Y.S.2d___, (July 2, 1996) appears at Appendix B. (p. A-7) The court order dismissing the appeal as of right is reported at 87 N.Y.2d 1054, ___N.Y.S.2d___ (April 2, 1996)

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, dated December 27, 1995, reported at ___A.D.2d___, 636 N.Y.S.2d 97 (2nd Dept. 1995) appears at Appendix C. (p. A-8)

The memorandum decision of the Supreme Court of the State of New York, Suffolk County, dated April 4, 1994, Index No. 92/1584 is not reported. It appears at Appendix D. (p. A-12)

STATEMENT OF JURISDICTION

The final decision of the Court of Appeals of the State of New York, deciding that the mapping of property as a wetlands, prohibiting its use as anything but a wetlands, does not constitute a taking in the hands of a subsequent purchaser, and that a covenant that requires a property owner to seek a permit from the municipality before a structure may be erected, permits the municipality to deny all uses other than the preservation and maintenance of a wetlands without violating the Fourteenth Amendment and the Takings Clause of the Fifth Amendment to the United States Constitution, was entered on February 18, 1997. This petition was timely filed in accordance with Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

The constitutional provisions involved in the case are the Takings Clause of the Fifth Amendment to the United States Constitution which reads "...; nor shall private property be taken for public use without just compensation" and the portion of the Fourteenth Amendment to the United States Constitution which reads "...; nor shall any State deprive any person of life, liberty, property without due process of law; ..."

The statute involved in the case is Article 25 of the New York State Environmental Conservation Law (the "Tidal Wetlands Act") the pertinent portions of which appear at Appendix E. (p. A-18) Also involved in the case are similar provisions of the Southampton Town Code which appear at Appendix F. (p. A-23)

STATEMENT OF THE CASE AND HOW THE FEDERAL QUESTION WAS PRESENTED

This is a condemnation case involving the destruction, prior to the condemnation, of the value of property by respondent and the State by designating the entire property as wetlands and prohibiting its use as anything but wetlands. Following the designation, respondent acquired the property, by condemnation and appraised the property at a minimal amount because it and the State, by their wetlands regulations, had destroyed the value. Respondent's appraiser attributed to the property, a highest and best use he called "Esthetic," because it was a wetlands, and he defined that term as follows:

> "This is a broad term that I have selected to represent a preservation or non-active use which would be of value to an adjoining owner, private groups (Nature Conservancy, etc.) or to governments (town, village, state, etc.) that purchase tidal wetlands for management and preservation" (Record on Appeal to the New York State Court of Appeals, p. 416-25)

Petitioner submitted a pre-trial memorandum to the trial court asserting that the designation of the entire property as a wetlands and the strict enforcement of the wetlands

regulations to the subject property, permitting nothing but the management and preservation of a wetlands on the property would be an unconstitutional regulatory taking. Petitioner further asserted that the strict enforcement of the regulations, had there been no condemnation, would probably be set aside administratively or, failing that, overturned by the courts in accordance with this Court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 12 S.Ct. 2886 (1992), supra, and as provided for in *Sec. 25-0404 Environmental Conservation Law (ECL).* (Appendix E, p. A-22)

Petitioner submitted an appraisal premised on the fact that the wetlands restrictions could be successfully challenged as an unconstitutional regulatory taking. (Record on Appeal to the Court of Appeals, p. 314-15, 322)

The trial court, by a judge sitting without a jury, rejected petitioner's appraisal and its premise and adopted the appraisal and premise of respondent's appraisal. It held:

> "In view of the fact that the claimant acquired the property when it was already subject to the wetlands restriction and the evidence with respect to the consideration paid for the property in 1980, the last arms length transfer of the property, the Court finds that the claimant's expert incorrectly assumed that a constitutional challenge to the wetlands designation by the claimant or subsequent transferee would likely be successful. Based upon such error, the Court must reject the appraisal submitted by the claimant." (Exhibit D, p. A-16)

> "...In view of the foregoing, the Court finds that the highest and best use of the property is for recreational or aesthetic purposes..." (Record on Appeal to the New York State Court of Appeals, p. 10a) (Appendix D, p. A-17)

Petitioner appealed to the New York State Supreme Court, Appellate Division, Second Department and, in its brief and oral argument to that court, raised the issue of the unconstitutionality of the restrictions that would deny to petitioner's property any economically viable, beneficial or productive use, as determined by this Court in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992), supra, and *Lopes v. City of Peabody,* ___U.S.___, 113 S.Ct. 1574. (Brief for Claimant Appellant [Petitioner] to the New York State Supreme Court-Appellate Division, Second Department, pp. 6-21)

The Appellate Division, in *Basile v. Town of Southampton,* 222 A.D.2d, 638, 636 N.Y.S.2d 97, affirmed the decision of the trial court, saying:

> "The claimant's predecessors in interest and the claimant knew, at the time of the purchase/acquisition in 1980 and 1989, that the property was encumbered by wetland restrictions and might not be buildable. Thus while the claimant conceded and the Town proved that the claimant would be denied a permit to build on the

> property due to the wetlands restrictions,[1] the Town demonstrated that in light of the declaration and the wetlands mapping, the claimant did not have any reasonable investment-backed expectation of building on the property, the potential of building on the property was not part of her title to begin with, and there was no categorical regulatory taking (see, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003; *Gazza v. New York State Dept. of Envir. Conservation,* ___A.D.2d___ [2nd Dept., Dec. 4, 1995]). Accordingly, the Supreme Court properly awarded the claimant the value of the property as restricted by the wetlands regulations (see e.g. *Lucas v. South Carolina Coastal Council, supra; Berwick v. State of New York,* 107 A.D.2d 79, 93; *Chase Manhattan Bank v. State of New York,* 103 A.D.2d 211, 219)." (Record on Appeal to the New York State Court of Appeals, pp. 444-445) (Appendix C, p. A-10)

Petitioner, on April 16, 1996, moved for leave to appeal in the New York State Court of Appeals on the same

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1 The Appellate Division, in its decision, incorrectly stated that Petitioner conceded that she would be denied a permit to build on the property due to the wetlands restrictions. Petitioner's position on the trial and the appeal was that the Town, because denying the permit would be an unconstitutional regulatory taking, would be required to grant a permit pursuant to Art. 25 - ECL and if it were denied, such denial would be overturned in Court.

constitutional grounds recited above. The Court of appeals granted petitioner's motion on July 2, 1996. (Record on appeal to the New York State Court of Appeals, pp. 449-451) (Appendix B, p. A-7)

Petitioner raised the constitutional issues in her brief to the Court of Appeals. Specifically she raised it in "Questions Presented" (pp. 6-8) and the argument. She argued that because the wetlands restrictions, if applied to the subject property, would deprive it of all economically viable use and would, therefore, be successfully challenged, that should have been considered in making the condemnation award. (Petitioner's Brief to the Court of Appeals, Point I, pp. 8-17) She further argued that the principle still applies when the property was purchased after the regulations were adopted and applied to the property. (Petitioner's Brief to the Court of Appeals, Point II, pp. 17-20)

The Court of Appeals affirmed the decision of the Appellate Division, Second Department, holding:

> "...the valuation of claimant's property should reflect the applicable environmental restrictions. Whatever taking claim the prior landlord may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by claimant here who took title after the redefinition of the relevant property interests..." (Appendix A, p. A-3)

The majority and concurring opinions both also made reference to covenants recorded by a predecessor in title saying:

> "...the wetlands restrictions at issue in this case did not deprive claimant of any interest in the property that had not already been encumbered' by virtue of the covenants entered into by the former owner..." (Appendix A, p. A-3)

It should be noted that the trial court never relied on or even referred to the covenant in its decision. (Appendix D, p. A-12) An examination of the covenant referred to (Appendix G, p. A-29) reveals that the property owner agreed he could not build without getting a permit. That is nothing more than a restatement of what a property owner must do in any event and adds nothing to the ordinary burdens of property owners who wish to build.

REASONS FOR GRANTING THE WRIT

This was not a simple affirmance in an isolated case or set of cases. Each of the four petitioners (see p. ii of this petition) had lost at the Appellate Division level and in each case, the Court of Appeals granted leave to appeal. The Court did not just wish to affirm. It wanted to make a statement on the law. That statement, we believe, is in direct conflict with the decisions of four other States and of this Court. The New York trial courts have already heard the statement and are starting to decide cases accordingly. (*Brotherton v. NYSDEC,* Case No. 12809-90, Sup. Ct., Suffolk Cty., IAS 8, 2/24/97)

In June, 1992, this Court, in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, supra, said that regulation of land is compensable, "where regulation denies all economically beneficial or productive use of land" (505 U.S. 1015, 112 S.Ct. 2893, supra). New York State, in

this case and in the three others decided on the same date, has carved out an exception to that rule. It has decided that that rule applies only when the property is in the hands of the owner at the time the confiscatory regulations were adopted and that, should the property be sold or transferred to another, with the regulations in place, that subsequent purchaser or transferee could not challenge the constitutionality of those regulations, regardless of how confiscatory those regulations might be.

This exception, through the back door, nullifies this Court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, supra. If a potential purchaser may not, upon purchase of property that is unconstitutionally restricted, challenge that unconstitutional restriction, he or she will not purchase the property. The practical effect is that the property, in the hands of the original owner, has been rendered unmarketable and thereby, valueless.

The decision of the New York Court of Appeals is also directly in conflict with this Court's decision in *Lopes v. City of Peabody,* ___U.S.___, 113 S.Ct. 1574, (1993) supra, which was decided after an intermediate appellate court in Massachusetts made the same decision as the New York courts have in this case. (*Lopes v. City of Peabody,* 32 Mass. App. Ct. 1124, 595 N.E.2d 812 (1992) rev. den. 413 Mass. 1105, 600 N.E.2d 171 (1992)) This Court granted certiorari, vacated the judgment and remanded the case to the Massachusetts Court of Appeals, "for further consideration in light of Lucas..." (___U.S.___, 113 S.Ct. 1574, (1993), supra)

Further, this decision of the New York State Court of Appeals is in conflict with the decisions of the Courts of at least four other states. Following the remand by this Court in *Lopes v. City of Peabody,* ___U.S.___, 113 S.Ct., 1574,

(1993) supra, the Supreme Judicial Court of Massachusetts, transferred the case to itself and in *Lopes v. City of Peabody,* 417 Mass. 299, at pages 303, 304 and 306, 629 N.E.2d 1312 (1994) held that it does not matter that the property was purchased with knowledge that wetlands restrictions had been in place for six years. Michigan has held similarly in *K & K Construction, Inc. v. Department of Natural Resources,* 217 Mich. App. 56, 64, 551 N.W.2d 413, 417 (Ct. App. Mich, 6/4/96) as has New Jersey in *Moroney v. Mayor and Council of the Borough of Old Tappen (N.J.),* 268 N.J. Super. 458, 633 A.2d 1045, 1048 (N.J. Super A.D., 1993) and Florida in *Vatalaro v. Department of Environmental Regulation,* 601 So.2d 1223 (5th Dist. Fla., 1992) review den. 613 So.2d 3 (Fla. 1992).

For these reasons as well as to clarify what this Court was referring to in Lucas when it discussed "reasonable investment-backed expectations" and what is "part of his title to begin with," we respectfully urge this Court to review the decision below.

ARGUMENT

POINT I

THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THERE IS A DIRECT CONFLICT BETWEEN THE NEW YORK COURT OF APPEALS AND FOUR STATES ON THE QUESTION OF WHETHER THE CONSTITUTIONAL RIGHT TO CHALLENGE A REGULATORY TAKING IS LOST UPON THE TRANSFER OF THE AFFECTED PROPERTY.

A. The decision in *Basile v. Town of Southampton* conflicts directly with the Supreme Judicial Court of Massachusetts holding that a purchaser of property with regulatory restrictions in place has the same right as the predecessors in title to challenge the constitutionality of the restrictions as applied to his or her property.

No two cases could be more similar in their facts than *Basile v. Town of Southampton* (2 No. 11, 1997, WL. 68581 (N.Y. Feb. 18, 1997)) and *Lopes v. City of Peabody,* (32 Mass. App. Ct. 1124, 595 N.E.2d 812 (1992) review denied, 413 Mass. 1165, 600 N.E.2d 171 (1992), cert. granted and judgment vacated, 113 S.Ct. 1574 (1993), on remand, 417 Mass. 299, 629 N.E. 1312 (1994)) and no two cases could have more dissimilar results, solely because of the states in which the cases were decided. In Basile, as well as Lopes, the property was mapped as wetlands prior to the purchase. In

both cases, no use could be made of the property except the preservation of the property as wetlands. In the Basile case, this was admitted by respondent in its appraisal (see p. of this petition), and was the basis of its value in the condemnation trial. It was also the basis of the condemnation award by the trial court. This Court said, in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, at 101, 112 S. Ct. 2894-2895, supra:

> "On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use — typically, as here, by requiring land to be left substantially in its natural state — carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."

In the *Lopes* case, the Massachusetts Appeals Court upheld the wetlands restrictions as applied to Lopes' property for, among other reasons, Lopes had purchased the property with full knowledge of its location in the restricted district (32 Mass. App. Ct. 1124, 595 N.E.2d 812 [1992], unpublished). This is the same holding as that of the New York Court of Appeals in the Basile case and the three related cases. (See p. ii of this petition)

After the Supreme Judicial Court of Massachusetts denied Lopes' application for further review (413 Mass. 1105, 600 N.E.2d 171 [1992], this Court granted Lopes' petition for a writ of certiorari, reversed, vacated the judgment and

remanded the case to the Appeals Court "for further consideration in light of [the Lucas case]." Although it was not explicitly stated, implicit in this, we understood, was the determination by this Court that it did not matter that the purchase of the property was made, by Lopes, with its location already in a regulated wetlands district. Lopes was in the same legal and constitutional position as Lucas.

The Supreme Judicial Court of Massachusetts apparently understood this Court's remand as we did for it then granted a request for direct review and held:

> "...Lopes, a purchaser of land subject to the restriction at the time of his purchase, has every right to challenge the continued application of the restriction. (Citing case) We see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning first affected it. A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances and tend to press owners to bring actions challenging any zoning provisions of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-guilt pattern of the enforceability of a zoning law intended to have uniform applicability." *Lopes v. City of Peabody*, 417 Mass. 299 at 303, 629 N.E.2d 1312 at 1314-1315, supra.

In conflict with this, the New York Court of Appeals held, in the instant case:

> "Enactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations. `The relevant property interest owned by a [purchaser] are defined by those state laws enacted and in effect at the time [title is taken] and they are not dependent on the timing of state action pursuant to such law.' (Citing Gazza, decided the same day) Since claimant took title to her property subject to wetlands regulations and the encumbrances of certain covenants,[2] she cannot claim the value of her property without such restrictions." (Appendix A, p. A-3)

There is a direct conflict between the decisions of the Massachusetts and New York Courts and it should be resolved by this Court.

B. The decision in *Basile v. Town of Southampton* conflicts directly with the Court of Appeals of Michigan holding that the right to challenge the constitutionality of wetlands regulations is transferred to the purchaser on the sale of the property when the restrictions were placed on the property prior to the sale.

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2 The covenant referred to is included in a recorded declaration (Appendix G, p. A-29) and is discussed at p.8 & 20 of this petition.

In *K & K Construction, Inc. v. Dept. of Natural Resources,* 217 Mich. App. 56, 551 N.W.2d 413, (1996), supra, a case involving a regulatory taking, the property owner sought and was denied a permit to build a restaurant on a part of its property, part of which was determined to be protected wetlands under the *Wetland Protection Act (WPA), M.C.L.* Sec. 281.701, et seq.; M.S.A. Sec. 18.595(51) et seq. Plaintiffs sought a determination that the denial constituted a taking for which they were entitled to just compensation. The trial court determined that the wetlands restrictions rendered the property essentially worthless as commercial real estate and the plaintiffs were therefore entitled to just compensation which was awarded.

The Dept. Of Natural Resources, on appeal, argued, inter alia, that because K & K received title to the property after the regulation was enacted, it is precluded from compensation. The Court of Appeals of Michigan, citing this Court's decision in *Nollan v. California Coastal Commission,* 483 U.S. 825, 833, n. 2, 107 S.Ct. 3141, 3147 n.2, 97 L.Ed.2d 677 (1987) held that as long as the owner in title at the time the restrictive regulations were enacted could not be deprived of just compensation, upon transfer of title to another, the full property rights, including the right to challenge the constitutionality of the regulations, as applied to the subject property, were transferred as well.

Here too, there is a direct conflict between the decisions of the Michigan and New York Courts which should be resolved by this Court.

C. The decision in *Basile v. Town of Southampton* conflicts directly with the decision of the Superior Court of New Jersey, Appellate

Division, that when an owner of property possesses the right to assert a taking by virtue of a restrictive regulation, the right to assert the taking passes with the title upon transfer of the property.

In *Moroney v. Mayor and Council of the Borough of Old Tappen*, 268 N.J. Super. 458, 633 A.2d 1045 (1993), cert. denied, 136 N.J. 295, 642 A.2d 1004 (1994), supra, the property had been, long before it was purchased, zoned so that it was undersized and could not be built upon without a variance. An application for a hardship variance was denied. The denial was upheld on appeal because the zoning advanced legitimate state interests but the same judge, as a result of that decision, entered judgment in favor of plaintiffs for inverse condemnation because the property was rendered useless. On appeal, the Superior Court of New Jersey, Appellate Division, affirmed, holding that the property owners stand in the shoes of their predecessors in title and to the extent that the predecessors would have had the right to assert the taking, that right passes with the title upon transfer of the property.

D. The decision in *Basile v. Town of Southampton* conflicts directly with the decision of the District Court of Appeal of Florida which held that denying a building permit to one who purchases after restrictive regulations have been adopted is a taking, requiring just compensation.

In *Vatalaro v. Department of Environmental Regulation*, 601 So.2d 1223 (5th Dist. Fla. 1992), rev. den., 613 So.2d 3 (Fla., 1992) as with the Lopes case in Massachusetts, the facts

were virtually identical to the Basile case in that Vatalaro bought her property after the regulations requiring it to be left in its natural wetlands state was adopted. However, as with Lopes, the results could not be more different, as the District Court of Appeal ruled that the denial of a permit to build a residence and a septic tank denied to Mrs. Vatalaro, all economically viable uses and was a taking requiring just compensation. As with Lopes and Basile, the difference is the state making the decision.

As with Massachusetts, Michigan and New Jersey, the decision of the New York Court of Appeals is in direct conflict with the decision of the District Court of Appeal of Florida, Fifth District, and should be resolved by this Court.

POINT II

THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THE DECISION OF THE NEW YORK COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN REGULATORY TAKING CASES.

A. The decision of the New York Court of Appeals not only permits the taking of property of subsequent purchasers without just compensation but property of the original owner as well, thereby effectively nullifying, through the back door, this Court's regulatory takings decisions.

This Court has, since 1922, repeatedly decided that regulations which deny to property owners, all economically viable, beneficial or productive uses of their property, rendering them thereby, valueless, constitute a taking of property without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. (*Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158 (1922); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 98 S.Ct. 2646 (1978); *Kaiser Aetna v. United States,* 444 U.S. 164, 100 S.Ct. 383 (1979); *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141 (1987); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992), supra).

The Takings Clause of the Fifth Amendment has been made applicable to the States through the Fourteenth

Amendment. *Chicago Burlington & Quincy Railroad Company v. Chicago,* 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed 979 (1897).

In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, (1922) supra, the first regulatory takings case, Justice Holmes said, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." In the Basile case, the regulations, upheld by the Court of Appeals, permitted no use for the entire property, other than the preservation and management of the property as wetlands. It is difficult to imagine a regulation that can go farther than that.

This Court refined the doctrine further in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 at 1019 when it said, "...when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." The reason for this doctrine is that by taking away, from property, all economically viable, beneficial or productive uses, the government has taken away virtually all of the value of that property.

If the original owner of the property has the right to challenge the wetland regulations as an unconstitutional taking without just compensation but a potential purchaser will not have that right, who is going to purchase the property? If the decision of the New York Court of Appeals in the Basile case and the three other cases decided on that date is the law, no one will buy the property for they will be allowed no economically viable, beneficial or productive use. The property in the hands of the original owner, by virtue of this New York decision, has become unmarketable and, thereby,

valueless, effectively nullifying Lucas and the long line of regulatory taking cases decided by this Court.

B. The holding of the New York Court of Appeals that the existence of the covenant bars petitioner from challenging the denial of the right to use the property for any economically viable, beneficial or productive use is in conflict with prior decisions of this Court.

The Declaration referred to in the opinion and concurring opinion of the Court of Appeals, which was signed and recorded by petitioner's predecessor in title, contains five covenants (Appendix G, pp. A-30 & A-31). The first covenant is the only one that is of concern in this case. It states, in its entirety, "That no building or structure shall be erected on Parcel No. 4 as described in Schedule A, [the subject property] unless and until said Parcel No. 4 is approved as a building lot by the Planning Board of the Town of Southampton."[3]

This covenant declares to the world, including subsequent purchasers such as petitioner, that in order to build on the property, they must come to the Planning Board to get a permit. The covenant, by its terms, put subsequent purchasers of the subject property in the same position as all similar applicants. It changed nothing. All property owners, at least all property owners in New York, must apply to the appropriate board in the municipality for a permit before they may build on their property. The fact that the covenant restates this does not confer upon the municipality the right to deny the

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3 The Court of Appeals also referred to the preamble which is part of the Declaration but not one of the covenants.

permit if, by doing so, they would deny to the property all economically viable, beneficial or productive uses of the property for, as this Court has said, in the cases cited in Point IIA, that would be a taking in violation of the Takings Clause of the Fifth Amendment. If it gives municipalities that right, it gives them the right to deny all economically viable, beneficial or productive uses to all property owners, for all owners must come to the municipality for a permit and may not build unless and until that permit is granted.

The covenant did not, by its terms, explicitly reserve to the Planning Board the right to deny the permit. Nor did it deny, at that time, the right to build on the property. Had it done so, it would be in conflict with this Court's decision in *Nollan v. California Coastal Commission,* 483 U.S. 825, at 833 n.2, 107 S.Ct. 3141, at 3197, n.2, supra, where it said:

C. The decision of the New York Court of Appeals in Basile v. Town of Southampton is in direct conflict with decisions of this Court.

The decision of the New York Court of Appeals, to the effect that what would constitute a taking of property in the hands of the original owner is not a taking in the hands of a subsequent purchaser or owner, is in direct conflict with this Court's decision in *Nollan v. California Coastal Commission,* 483 U.S. 825, at 833, n.2, 107 S.Ct. 3141, at 3147, n. 2, (1987), supra, where it said:

> "Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating

> them, the prior owners must be understood to have transferred their full property rights in conveying the lot."

Further, this Court, in *Lopes v. Peabody*, ___U.S.___, 113 S.Ct. 1574 (1993), supra, following the decision of the Massachusetts Appeals Court, which had upheld the City of Peabody's wetlands restrictions as applied to Lopes' property because, inter alia, Lopes had purchased the property six years after the restrictions were in place (32 Mass. App. Ct. 1124, 595 N.E.2d 812 (1992), supra), granted certiorari, vacated the judgment and remanded the case to the Appeals Court. Apparently, the Supreme Judicial Court of Massachusetts understood this Court's decision to mean that if a regulation of property amounts to a taking, it does not change because the property has changed hands. The New York Court of Appeals, in Basile v. Town of Southampton, and the three other cases with a similar issue decided on February 18, 1997, did not understand this Court's decision in Lopes the same way, as its decisions are in direct conflict with the understanding of the Massachusetts, Michigan, New Jersey and Florida Courts. Whichever of the two understandings this Court intended in *Lopes v. Peabody*, ___U.S.___, 113 S.Ct. 1574 (1993), supra, apparently needs to be made more explicit and perhaps it needs more than the footnote in *Nollan v. California Coastal Commission*, 483 U.S. 825, at 833, n.2, 107 S.Ct. 3191, at 3147, n.2 (1987), supra.

CONCLUSION

To resolve the conflicts between New York and Massachusetts, Michigan, New Jersey and Florida, to clarify the understanding of this Court's decisions and to provide necessary uniform guidance on an increasingly important principle of Federal Constitutional law, this Court should grant the petition for writ of certiorari.

Dated: New York, New York
May 15, 1997

Respectfully Submitted,

MICHAEL J. GOLDSTEIN
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Dorothy A. Basile
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APPENDICES

APPENDIX A

State of New York
Court of Appeals

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2 No. 11
Dorothy A. Basile,

Appellant,

v.

Town of Southampton,

Respondent.

MEMORANDUM
This memorandum is uncorrected and subject to revision before publication in the New York Reports.

Michael J. Goldstein, for appellant.
Wayne D. Bruyn, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

In 1980, claimant's family acquired 12 acres of property situated near Moriches Bay in the Town of Southampton. At that time, the land was zoned for residential development and subject to further regulation because of its location within the Tidal Wetlands and Ocean Beach Overlay District and the Tidal Floodplain Overlay District. In fact, over 95% of the

parcel consists of tidal wetlands as inventoried pursuant to the Tidal Wetlands Act (ECL § 25--0201).

The 1980 purchase was made subject to certain covenants which had been filed by the former owner in the Suffolk County Clerk's Office. These covenants stated that the parcel "may consist of wetlands and may not be suitable for erection of a dwelling thereon." The covenants further stated that "no building or structure shall be erected on [the parcel] unless and until said [parcel] is approved as a building lot by the Planning Board of the Town of Southampton."

In 1990, respondent Town of Southampton acquired from claimant Basile, by condemnation, the fee title ownership to the parcel. The Town's appraiser initially valued the land at $128,000 and an advance payment was made in that amount to claimant (EDPL § 304). The Town later revised its appraisal to $117,500 and claimant submitted a counter-appraisal listing the property value at $960, 000. The wide disparity between the valuations submitted by the parties stems primarily from the fact that only the respondent's estimate reflects the property value as restricted under the wetlands regulations. Supreme Court warded claimant $117,500.[1]

Claimant argues that the wetland regulations which decreased the market value of her property effect an unconstitutional taking (US Const, Amend V; NYS Const, Art 1 § 7), and the formal condemnation proceeding requires just compensation of the pre-regulatory property value. Respondent counters that it is the property value, as restricted,

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Respondent has not sought the difference between the advance payment and the award by Supreme Court. Claimant retains those funds.

which must dictate the amount of compensation in a condemnation proceeding.

Generally, upon condemnation, property value should be calculated with due consideration paid to the applicable restrictions upon use (*cf. Town of Islip v Mascioli*, 49 NY2d 354, 360 ["Ordinarily the potential uses the court may consider in determining value are limited to those uses permitted by the zoning regulations at the time of taking"]). Here, the valuation of claimant's property should reflect the applicable environmental restrictions. Whatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by claimant here who took title after the redefinition of the relevant property interests. Moreover, as the concurrence notes, "the wetlands restrictions at issue in this case did not deprive claimant of any interest in the property that had not already been encumbered" by virtue of the covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel.

Enactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations. "The relevant property interests owned by a [purchaser] are defined by those state laws enacted and in effect at the time [title is taken] and they are not dependent on the timing of state action pursuant to such law" (*Gazza v New York State Dept. of Environmental Conservation*, (___NY2d___[opn at 13] [decided today]). Since claimant took title to her property subject to wetlands regulations and the encumbrances of certain covenants, she cannot claim the value of the property without such restrictions.

WESLEY, J.: (Concurring)

For the reasons set forth in my dissenting opinion in *Anello v Zoning Board of Appeals* (___NY2d___[decided today), I cannot agree that claimant is prevented from claiming the value of her property without the wetlands regulations solely because she took title after the enactment of those regulations. Nevertheless, I concur in the result reached by the majority, because the claimant took title subject to the covenants filed by the former owner of the property, which substantially restrict the value and use of the property.

Even if we were to accept claimant's argument that the property must be valued as if it could be developed for one or more single-family residences because the alternative use for recreational or aesthetic purpose is not an economic use (*cf., Lucas v South Carolina Coastal Council,* 505 US 1003, 1044 [Blackmun, J., dissenting]), that is a consequence of the covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel. The wetlands regulations at issue in this case did not deprive claimant of any interest in the property that had not already been encumbered by the former owner by virtue of the covenants. As such, an unrestricted right to develop the parcel no longer remained in the "bundle" of rights that claimant acquired through the former owner, and Supreme court properly determined that the Town need not compensate claimant as if she retained that right.

Order affirmed, with costs, in a memorandum. Chief Judge Kaye and Judges Bellacosa, Smith, Levine and Ciparick concur. Judge Wesley concurs in result in an opinion. Judge Titone took no part.

Decided February 18, 1997

Court of Appeals
State of New York

The Hon. Judith S. Kaye, Chief Judge, Presiding

2 No. 11

Dorothy A. Basile,

Appellant,

v.

Town of Southampton,

Respondent.

COPY/stamp

The appellant in the above entitled appeal appeared by Goldstein Goldstein & Rikon, P.C.; the respondent appeared by Wayne D. Bruyn, Esq., Southampton Deputy Town Attorney.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum. Chief Judge Kaye and Judges Bellacosa, Smith, Levine and Ciparick concur. Judge Wesley concurs in result in an opinion. Judge Titone took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Suffolk County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/signature/
Stuart M. Cohen, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 18, 1997

APPENDIX B

449

DECISION OF COURT OF APPEALS, DATED JULY 2, 1996

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION July 2, 1996

2-10 Mo. No. 561
Motion for leave to appeal granted.

Dorothy A. Basile,

Appellant,

v.

Town of Southampton,

Respondent.

APPENDIX C

444
DECISION & ORDER OF APPELLATE DIVISION - SECOND DEPARTMENT, DATED DECEMBER 29, 1995

[Pages 444-446]

0771Z
S/hu
Argued - December 5, 1995

— AD2d —

ALBERT M. ROSENBLATT, J.P.
DAVID S. RITTER
EDWARD J. HART
GABRIEL M. KRAUSMAN, JJ.

94-05588

Dorothy A. Basile, appellant
v Town of Southampton, respondent

DECISION & ORDER

Goldstein, Goldstein & Rikon, New York, N.Y. (Michael J. Goldstein of counsel), for appellant.

Wayne D. Bruyn, Deputy Town Attorney, Southampton, N.Y., for respondent.

In a condemnation proceeding, the claimant appeals on the ground of inadequacy, from an order and judgment (one paper) of the Supreme Court, Suffolk County (Werner, J.), dated May 5, 1994, which upon adopting the valuation of the respondent's expert, awarded her only $117,500, the value of the property as restricted by wetlands regulations, and failed to award her an increment for the reasonable probability of a successful challenge to the wetlands regulations as confiscatory.

ORDERED that the order and judgment is affirmed, with costs.

In April 1980 the claimant's husband paid $88,500 for 11.5 acres of property located in Remsenburg, in the Town of Southampton. At the time of his purchase, he was aware of a declaration dated January 8, 1976, which was made by his predecessor in interest who sought subdivision approval of the property. Pursuant to the declaration, the Planning Board of the Town of Southampton (hereinafter the Planning Board) permitted the subdivision of the property into four parcels and it approved Parcel Nos. 1, 2, and 3 as building lots. As to Parcel No. 4, however, the declaration provided that the Planning Board "is not willing at this time to approve Parcel No. 4 *** as a building lot because it may consist of wetlands and may not be suitable for erection of a dwelling thereon". The declaration also stated "[T]hat no building or structure shall be erected on Parcel No. 4 *** unless and until said Parcel No. 4 is approved as a building lot by the Planning Board of the Town of Southampton".

On September 14, 1977, after the date of the declaration but prior to the property's purchase by the claimant's husband, the New York State Department of Environmental

Conservation (hereinafter the DEC) adopted a Tidal Wetlands Inventory Map which encompassed the property. After the claimant's husband purchased the property in 1980, the DEC remapped wetlands in the area pursuant to a decision and order of the commissioner of the DEC issued February 6, 1986. Thereafter, the property was transferred for no consideration among family members, until the claimant acquired it in 1989, also for no consideration. The respondent Town of Southampton (hereinafter the Town) acquired title through condemnation by vesting order recorded March 8, 1990.

The claimant's predecessors in interest and the claimant knew, at the time of the purchase/acquisition in 1980 and 1989, that the property was encumbered by wetland restrictions and might not be buildable. Thus, while the claimant conceded and the Town proved that the claimant would be denied a permit to build on the property due to the wetland restrictions, the Town demonstrated that in light of the declaration and the wetlands mapping, the claimant did not have any reasonable investment-backed expectation of building on the property, the potential of building on the property was not part of her title to begin with, and there was no categorical regulatory taking (*see, Lucas v South Carolina Coastal Council* 505 US 1003; *Gazza v New York State Dept. of Envir. Conservation, ___AD2d___* [2nd Dept. Dec. 4, 1995]). Accordingly, the Supreme Court properly awarded the claimant the value of the property as restricted by the wetlands regulations (*see e.g. Lucas v South Carolina Coastal Council, supra; Berwick v State of New York*, 107 AD2d 79, 93; *Chase Manhattan Bank v State of New York*, 103 AD2d 211, 219).

ROSENBLATT, J.P., RITTER, HART and KRAUSMAN, JJ., concur.

94-05588

Dorothy A. Basile, appellant
v Town of Southampton, respondent.

DECISION & ORDER ON MOTION

Motion by the appellant on an appeal from an order and judgment (one paper) of the Supreme Court, Suffolk County, dated May 5, 1994, to strike stated portions of respondent's brief on the ground, *inter alia, that* it contains or refers to matters dehors the record. By decision and order on motion dated April 3, 1995, the motion was held in abeyance and referred to the Justices hearing the appeal for determination upon the argument or submission of the appeal.

ORDERED that the motion is denied.

ROSENBLATT, J.P., RITTER, HART and KRAUSMAN, JJ., concur.

ENTER:

Martin H. Browsteinl
Clerk

APPENDIX D

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM

DOROTHY BASILE,

Claimant,

-against-

TOWN OF SOUTHAMPTON

Respondent.

By BAISLEY J.S.C.

Dated April 4, 1994
Index #92/1584
Submitted 11/10/93
CDISPSJ

SAMUEL GOLDSTEIN, & SONS, ESQS.
Attorneys for Claimant
80 Pine Street
New York, New York 10005-1771

JOHN C. BIVONA, ESQ.
Attorney for Respondent
44 Elm Street
Huntington, New York 11743

This is a proceeding to determine a claim for damages arising from the acquisition of real property by the Town of Southampton. The parties tried this matter before the Court on June 22, 1993. The claimant submitted a pre-trial memorandum. At the conclusion of the trial, the parties ordered the transcript for the Court. Counsel for the claimant represented that there would be no further memorandum or evidence submitted by the claimant. The Court granted counsel for the Town leave to submit a memorandum within four weeks after submission of the transcript. The court received the transcript on August 10, 1993. The Court did not receive any memorandum on behalf of the Town. However, since this proceeding involves primarily the determination of an issue of law, the Court delayed marking the matter submitted, in anticipation of receiving a memorandum on behalf of the Town. When no such memorandum came, the Court marked the matter submitted on November 10, 1993.

The Town acquired title to the property at issue pursuant to a vesting order of this Court dated March 1, 1990. The property consists of approximately twelve acres of undeveloped land. The appraiser for the Town has placed a value of $117,500.00 on the property. The appraiser for the claimant valued the property at $960,000.00. The difference in such values is primarily the result of one fact: The property is almost entirely classified as wetlands pursuant to he Tidal Wetlands Act. Thus, although the property is zoned for residential development by the Town of Southampton, the wetlands classification prohibits the use of the property for residential development.

The appraisal figure adduced by the Town is based upon the value of the property as restricted. The appraisal upon which the claimant relies is based upon a calculation of the

difference between the value of the property as zoned and without any wetlands restriction and the value as restricted by the wetlands designation. The claimant's expert then reduced such difference by ten percent on the basis that the owner or purchaser of the property would have to have the wetlands restriction nullified by an action in court. The expert specifically notes that the ten percent figure is based on the assumption that "a reasonable probability exists in a successful outcome." The claimant's expert then divided the foregoing figure by the value of the property as restricted to produce a multiplier. By applying the multiplier to the value of the property as restricted by the wetlands designation, the claimant's expert valued the market value of the property, as presently zoned and restricted by the wetlands designation, at $960,000.00. The claimant asserts that the expert's calculation of value is based upon the precedents set in *Chase Manhattan Bank vs. State of New York*, 103 A.D. 2d211, 479 N.Y.S. 2d983 (2d Dept. 1984), *Berwick vs. State of New York*, 107 A.D. 2d79, 486 N.Y.S. 2d 260 (2d Dept. 1985), and *Berwick vs State of New York*, 159 A.D. 2d 544, 552 N.Y.S. 2d 409 (2d Dept. 1990).

The Court finds that several factors are present in the instant matter which apparently was not present in the precedents upon which the petitioner relies. In the instant matter, it appears that the property at issue was restricted by the wetlands restriction for a significant period prior to the time that the claimant acquired the property. In addition, the evidence indicates that the claimant has title to the property by virtue of a deed dated, March 10, 1989 from Richard B. Brasile and the claimant to the claimant alone. The transfer was for no consideration. Richard B. Brasile and the claimant had acquired title to the property from Keith Gaskell, Teresa

Gaskell, Richard B. Brasile, and the claimant, as tenants in common, by deed dated June 16, 1986. Again, the property was transferred without consideration. The grantors in such transaction acquired title to the property from Keith Gaskell and Teresa Gaskell by deed dated December 27, 1985. The transfer was for no consideration. The grantors in the 1985 transaction acquired title by deed dated May 18, 1984 for no consideration. The grantor in the 1984 transaction acquired title by deed dated June 11, 1981 for no consideration. Both parties apparently agree that all of the above transfers of the property were between members of the same extended family. In addition, the record indicates that the grantor in the 1981 transfer, Richard Basile, acquired title to the property from Tuthill Associates, a partnership, pursuant to a deed dated April 18, 1980. The evidence also indicates that the consideration for such transfer was $88,500.00 It appears from the record that such transfer was an arm's length transaction not involving related parties.

As noted previously, the conclusion of the claimant's expert with respect to the value of the property for the purpose of determining the just compensation due the claimant is dependent upon the assumption that a constitutional challenge to the wetlands designation on the property would likely be successful. Thus, the claimant's expert only discounted the difference between the unrestricted and restricted values of the property by a figure of ten percent for the required legal action. However, as noted above, it appears that the property was classified as wetlands for a significant period of time before the claimant acquired the property. This is not an instance where the property has been reduced in value by the promulgation of a land use restriction after the claimant acquired the property. In such an instance, the Court cannot

determine that the restriction at issue is confiscatory as to the claimant without evidence of the market value at the time of acquisition. See *Curtiss-Wright Corporation vs. Town of East Hampton*, 82 A.D.2D 551, 442 N.Y.S 2d 125 (2d Dept. 1981).

The claimant acquired title to the property in 1989 for no consideration. If the Court ignores such transaction and the other previous inter-family transactions as not being representative of the fair market value of the property, the Court is left with the 1980 arm's length transfer of the property from Tuthill Associates to Richard Basile. The consideration for such transfer was $88,500.00.

In view of the fact that the claimant acquired the property when it was already subject to the wetlands restriction and the evidence with respect to the consideration paid for the property in 1980, the last arm's length transfer of the property, the Court finds that the claimant's expert incorrectly assumed that a constitutional challenge to the wetlands designation by the claimant or subsequent transferee would likely be successful. Based upon such error, the Court must reject the appraisal submitted by the claimant.

In further support of the foregoing conclusion, the Court notes that its primary purpose in this proceeding is to determine the just compensation due the claimant for the appropriation of the property at issue. See Constitution of the State of New York, Article 1, §7. The Court's function is not to determine the issue of whether the property was confiscated by the wetlands designation promulgated by the State of New York. In view of the evidence regarding the consideration paid for the property by the claimant's predecessor in title in the last arm's length transaction in 1980, the Court rejects the

claimant's appraisal and accepts the valuation proposed by the Town.

In view of the foregoing, the Court finds that the highest and best use of the property is for recreational or aesthetic purposes. The Court also accepts the valuation of $117,500.00 proposed by the Town as the compensation due the claimant.

Settle judgment.

/Signature/
Paul J. Baisley

APPENDIX E

Title 2 - WETLANDS INVENTORY

§ 25-0201. Inventory of tidal wetlands

1. The commissioner shall as soon as practicable make an inventory of all tidal wetlands in the state of New York. This inventory, and any restrictive orders issued pursuant to section 25-0302 of this act, shall comprise a part of the statewide environmental plan as provided for in section 3-0303 of the environmental conservation law.

2. The inventory shall set forth the boundaries of such wetlands using such photographic and cartographic standards and techniques as the commissioner may deem reasonable and appropriate in order to provide clear and accurate maps of the tidal wetlands of the state for the purpose of effectuating the policies and provisions of this act. Said boundaries shall generally delineate all tidal wetlands in the state as defined in section 25-0101 of this act. At least sixty days prior to the commencement of the inventory the commissioner shall file with the secretary of state a detailed description of the technical methods and requirements to be utilized in compiling the inventory, and he shall afford the public an opportunity to submit written comments thereon.

3. Upon completion of tentative tidal wetlands boundary map for a particular area, the commissioner or his designated hearing officer shall hold a public hearing in order to afford an opportunity for any person to purpose additions or deletions from such map. The commissioner shall give notice of such

hearing to each owner of record of all lands designated as such wetland as shown on such maps, and also to the chief administrative officer of each municipality within whose boundary any such wetland or portion thereof is located, by certified mail, return receipt requested, not less than thirty days prior to the date set for such hearing. The commissioner shall also cause notice of such hearing to be published at least once, not more than thirty days nor fewer than ten days before the date set for such hearing, in at least two newspapers having a general circulation in the area where such wetlands are located.

4. After considering the testimony given at such hearing and any other facts which may be deemed pertinent and after considering the rights of affected property owners and the policy and purposes of this act, the commissioner shall establish by order the final bounds of each such wetland. A copy of the order, together with a copy of the map depicting such final boundary lines, shall be filed in the office of the clerk of the county in which each such wetland is located. The commissioner shall simultaneously give notice of such order to each owner of all lands designated as such wetlands by mailing a copy of such order to such owner. The commissioner shall also simultaneously give notice of such order by certified mail to the chief administrative officer of each municipality within whose boundary any such wetland or portion thereof is located. The commissioner shall also cause a copy of such order to be published in at least two newspapers having a general circulation in the area where such wetlands are located.

5. Any person aggrieved by such order may seek judicial review pursuant to article seventy-eight of the civil practice law and rules in the supreme court for the county which the

tidal wetlands are located, within thirty days after the date of the filing of the order with the clerk of the county in which such wetlands are located.

6. The commissioner shall supervise the maintenance of such boundary maps, which shall be available to the public for inspection and examination. The statewide inventory shall be readjusted from time to time as may be necessary to reflect such natural changes as have occurred through erosion, accretion, and otherwise and also to reflect such other changes as have occurred as a result of the granting of permits pursuant to section 25-0403 of this act. (Added L.1973, c.790, § 2; amended L.1976. C. 598, § 1.)

§ 25-0401. Regulated activities

1. After completion of the inventory prescribed in title 2 of this article with respect to any tidal wetland, no person may conduct any of the activities set forth in subdivision 2 of this section unless he has obtained a permit from the commissioner to do so. The permit issued by the commissioner shall be in addition to, and not in lieu of, such permit or permits as may be required by any municipality within whose boundary such wetland or portion thereof is located.

2. Activities subject to regulation hereunder include any form of draining, dredging, excavation, and removal either directly or indirectly, of soil, mud, sand, shells, gravel or other aggregate from any tidal wetland; any form of dumping, filling, or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind; the erection of any structures or roads, the driving of any pilings, or placing of any other obstructions, whether or not changing the ebb and flow of the tide, and any other activity within or immediately adjacent to inventoried wetlands which may

substantially impair or alter the natural condition of the tidal wetland area.

3. The depositing or removal of the natural products of the tidal wetlands by recreational or commercial fishing, shellfishing, aquaculture, hunting or trapping, shall be excluded from regulation hereunder, where otherwise legally permitted.

4. Activities, orders, and regulations of the department of health or of units of local government with respect to matters of public health shall be excluded from regulation hereunder, except as hereinafter provided. Copies of all such public health orders and regulations affecting tidal wetlands shall be filed with the department of environmental conservation. The commissioner may require modification of such orders or regulations if he deems it necessary to implement the policy of this act.

5. The commissioner shall review all current mosquito control projects to determine whether they are having any adverse impact on tidal wetlands. Where any adverse impact is found, the commissioner following a public hearing, may require modification of such projects if he deems it necessary to implement the policy of this act.

6. Where the dredging or filling is in the navigable waters of the state or is for the reconstruction or repair of certain dams and docks, and where such activity also substantially affects tidal wetlands, any person undertaking such activity must seek permission under this act as well as under any other applicable law.

§ 25-0404. Judicial review

Any person aggrieved by the issuance, denial, suspension or revocation of a permit may within thirty days from the date of the commissioner's order seek judicial review pursuant to article seventy-eight of the civil practice law and rules in the supreme court of the county in which the tidal wetlands affected are located. In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without compensation and the land so regulated otherwise meets the interest and objectives of this act, it may, at the election of the commissioner either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them as have been taken, proceeding under the power of eminent domain.

APPENDIX F

SOUTHAMPTON CODE

ARTICLE VIII
Tidal Wetlands and Ocean Beach Overlay District

§ 330-39. Purpose

The tidal wetlands and the ocean beach of the Town of Southampton are a unique and relatively scarce geographic environment that makes possible an ecological system necessary to propagate the finfish and shellfish essential as a source of food and as a basis for the economic vitality of the fishery industry and recreational fishing; further, it provides the natural habitat for migratory waterfowl along the Eastern Seaboard's international flyway, and it is fundamental to the scenic character and recreational potential that supports both the tourist and recreational economies as well as the year-round resident's enjoyment of his home community. Therefore, the town enacts these provisions as a matter of public policy, recognizing the extremely insecure status of these valuable natural resources, particularly in a time of rapid technological progress and urbanization, their limited suitability for development and the interest of all its people in these geographic areas, especially as established in the Dongan Patent and in other subsequent public acts, particularly with regard to the town title to all such lands below the high-water mark, and designates those specific areas as the Tidal Wetlands and Ocean Beach Overlay District and sets forth the following regulations which shall apply to said overlay district in addition to those regulations in the

standard districts as set forth in Articles II, VI and VII, as well as in other provisions of this chapter to assure the conservation of these natural resources and their ecological systems for the enjoyment of all people of the town and to provide appropriate guidance for growth development as well as to promote the health, safety and the general welfare of the town.

§ 330-40 Tidal wetlands regulations.

A. No building other than a government facility shall be constructed or maintained on or in a public tidal wetland.

B. No structure or floating facility, including regular or permanent moorings, shall be constructed or maintained or used for living quarters on or in a public tidal wetland, except as a permitted accessory use to an adjoining on-shore parcel of land or lot, a governmental facility or other facility only when found necessary to protect the natural environment from excessive erosion, silting or an imbalance in the ecological system of the tidal wetlands, after approval by the appropriate public agencies and the Trustees of the Freeholders and Commonalty of the Town of Southampton, and except for a fishing structure, duck blind and permanent mooring established in approved areas by the Trustees of the Freeholders and commonalty of the Town of Southampton.

C. Where a private landowner presents to the town a claim to title of lands within a tidal wetland area, he shall consent to town inspection of such lands so that such tests and investigations as may be considered appropriate by the town may be made. The town shall establish whether or not such a title is satisfactory within one hundred twenty (120) days of receipt of such claim. Where such title is determined to be satisfactory, such a private landowner may fill not more than ten percent (10%) of the required minimum lot area in the applicable upland district in which such property is located for a building site, and further provided that the location of such fill shall have been approved by the Trustees of the Freeholders and Commonalty of the Town of Southampton as that which will have the least impact on the ecological system of the tidal wetlands, and also provided that it shall have the approval of all other public agencies having jurisdiction.

D. Channel construction in the tidal wetlands shall be limited to only such channels as are necessary to provide minimum boat access to contiguous upland areas and then only if no suitable substitute structure can be used for such access that would have a lesser impact on the ecological system of the tidal wetlands as established by the Trustees of the Freeholders

and Commonalty of the Town of Southampton. No such facility shall be designed or used for any purpose incompatible with standard district regulations applicable to the adjoining onshore land.

E. Bulkheads shall be prohibited in all tidal wetlands except those in the resort and Waterfront Business District or when found necessary to protect the natural environment from excessive erosion, silting or an imbalance in the ecological system of the tidal wetlands after approval by the appropriate public agencies and the Trustees of the Freeholders and Commonalty of the Town of Southampton.

ARTICLE IX
Tidal Floodplain Overlay District
[Amended 5-13-86 by L.L No. 7-1986; 12-23-86 by L.L. No. 22-1986; 9-8-87 by L.L. No. 6-1987]

§ 330-42 Purpose.

Since the recorded history of Atlantic coastal storms and hurricanes establishes the fact that flooding of the ocean beach and uplands along the bays can be anticipated with consequent danger to life and health as well as property damage and other related hazards, and whereas the Corps of Engineers has analyzed this recorded history and established the flood stages related to a standard project design hurricane appropriate for the planning of necessary protective measures or for minimizing the dangers, damage and related hazards in

connection with the flood stages in the absence of such protective measures, the town of Southampton hereby establishes a tidal Floodplain Overlay District, derived by those elevations of land that approximate the standard project design hurricane, and regulations which shall apply to said overlay district, in addition to those regulations of the standard districts set forth in Articles II, VI and VII of this chapter, to minimize the dangers, damage and related hazards resulting from such storms and to promote the health, safety and the general welfare of the town.

§ 330-43. Composition of District

The Tidal Floodplain Overlay District of the Town of Southampton shall include the areas shown as Zones A, A5, A6, A7, and A8, Zones V7 and V8 and Zone B on the Flood Insurance Rate Map prepared for the Town of Southampton by the Federal Emergency Management Agency, dated June 1, 1983, which map is on file in

the offices of the Town clerk, Building Inspector, Planning board and board of Appeals, as the same may be from time to time changed and amended.

§ 330-44. Subdivisions.

A. Layout of subdivision lots in the Tidal Floodplain Overlay district on the barrier beach shall be such that each lot in the southerly and northerly side of dune road on the barrier beach shall have a minimum width from road to water of at least one hundred fifty (150) feet, except in an approved planned residential development.

B. All proposed subdivisions (minor or major) within the tidal Floodplain Overlay district shall be reviewed and approved by the appropriate governmental agencies having jurisdiction over tidal wetlands prior to the approval of the subdivision by the Planning board.

§ 330-45. Location of buildings and structures.

B. On all other water frontages, except as provided in § 330-40, all buildings or structures shall be set back seventy-five (75) feet upland of the edge of the tidal wetland, except that an accessory building or structure may be located in such setback if the Trustees of the Freeholders and commonalty of the town of Southampton finds that it will not tend to deteriorate the ecological values of the tidal wetland, provided, also that it shall have the approval of all other public agencies having jurisdiction.

§ 330-46. Provisions for flood damage prevention.

In addition to the provisions of this Article, all development within the Tidal Floodplain Overlay District shall also comply with the provisions of chapter 169, Flood Damage Prevention, of this Code.

APPENDIX G

DECLARATION

THIS DECLARATION, made the 8th day of January, 1976, by Tuthill Associates, a partnership having its offices at 109 Main Street, Westhampton Beach, New York, c/o Joseph L. Rhodie, hereinafter referred to as the Declarant.

WHEREAS, the Declarant is the owner of Certain real property situated at Remsenburg, Town of Southampton, Suffolk county, New York, more particularly bounded and described as set forth in Schedule "A" annexed hereto, and

WHEREAS, the Declarant has made application to the Planning Board of the Town of Southampton for approval to subdivide the said real property into four (4) parcels, bounded and described as set forth in Schedule "A" annexed hereto, and

WHEREAS, the Planning Board of the Town of Southampton is not willing at this time to approve Parcel No. 4 as described on Schedule A as a building lot because it may consists of wetlands and may not be suitable for erection of a dwelling thereon, and

WHEREAS, the Declarant desires to have Parcels No. 1, 2 and 3 as described on Schedule A approved as building lots at this time, even if said parcel No. 4 is not suitable for a building lot, and

WHEREAS, the Planning Board of the Town of Southampton is willing to approve said Parcel No. 1, 2 and 3 as building lots, provided that Parcel No. 4 is not approved as a building lot at this time, such that it cannot be built upon without a new application for approval as a building lot being made to and thereafter approved by the Planning Board of the Town of Southampton, and

WHEREAS, for and in consideration of the granting of said approval, the Planning Board of the Town of Southampton has deemed it to be for the best interests of the Town of Southampton and the owners and prospective owners of said parcels that the within covenants and restrictions be imposed on said parcels, and as a condition of said approval said Planning Board has required that the within Declaration be recorded in the Suffolk County Clerk's Office, and

WHEREAS, the Declarant has considered the foregoing and determined that the same will be for the best interests of the Declarant and subsequent owners of said parcels,

NOW, THEREFORE, THIS DECLARATION WITNESSETH:

That the Declarant, for the purpose of carrying out the intentions above expressed, does hereby make known, admit, publish, covenant and agree that the said premises herein described shall hereafter be subject to the following covenants which shall run with the land and shall be binding upon all purchasers and holders of said premises, their heirs, executors, legal representatives, distributees, successors and assigns, to wit:

1. That no building or structure shall be erected on Parcel No. 4 as described on Schedule A, unless and until said Parcel No. 4 is approved as a building lot by the Planning Board of the Town of Southampton.

2. That no structure shall be erected closer than 100 feet from the mean high water mark of Moriches Bay on Parcel No. 3.

3. That no overhead utility poles shall be erected on the said four parcels herein described.

4. That on Parcel No. 3, the 50 foot strip of land lying immediately north of the mean high water line of the Moriches Bay between Parcel No. 4 as described in Schedule A on the east and land now or formerly of Eugene Warren on the west shall be maintained in its natural state or on a state sufficient to prevent the lateral movement of silts and fertilizers.

5. That the within Declaration may not be annulled, waived, changed, or modified, unless and until approved by resolution of the Planning Board of the Town of Southampton, or its successors.

IN WITNESS WHEREOF, the Declarant above named has executed the forgoing Declaration the day and year first above written

TUTHILLL ASSOCIATES
By:/signature/
Joseph L. Rhodie

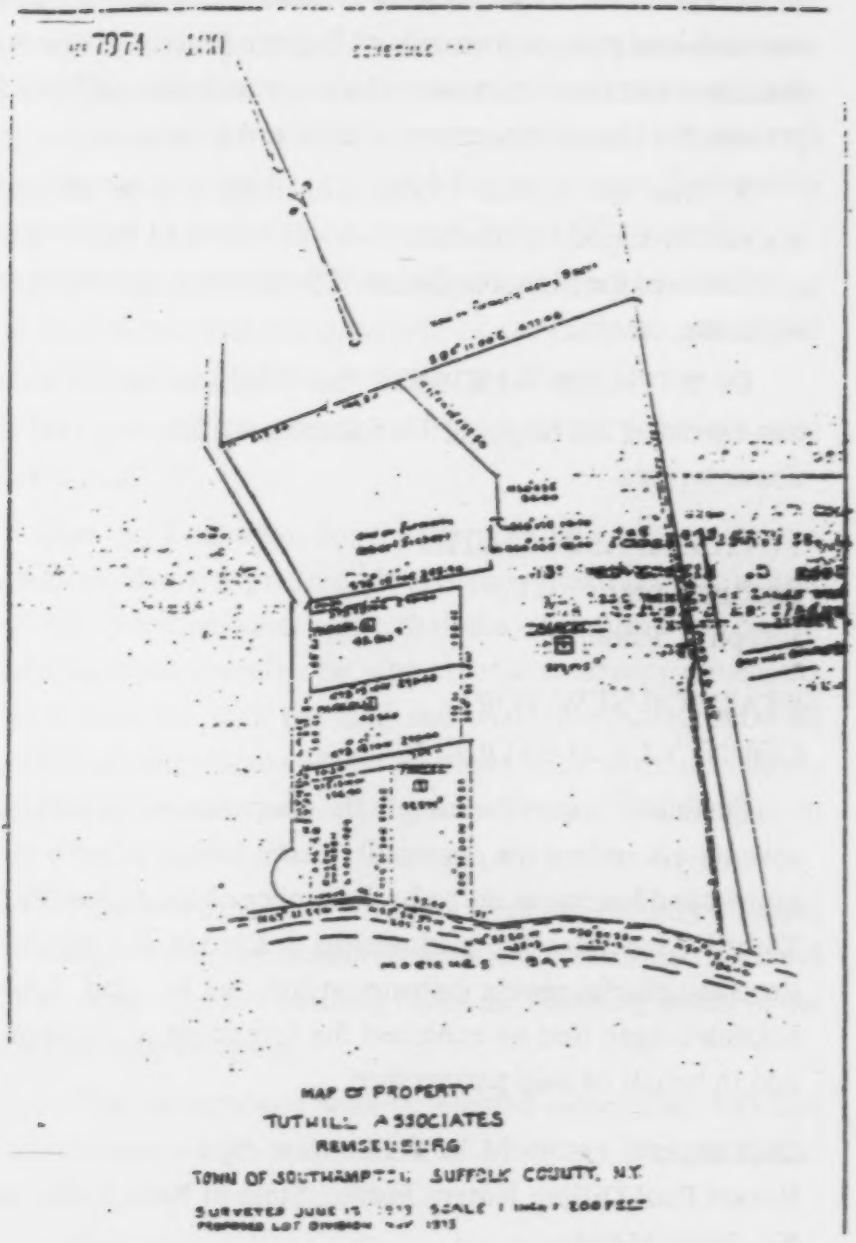
STATE OF NEW YORK
COUNTY OF SUFFOLK

On this 9th day of January in the year nineteen hundred and seventy-six before me personally came Joseph Rhodie to me known and known to me to be a member of the partnership of Tuthill Associates the partnership described in, and which executed, the foregoing instrument and said Joseph L. Rhodie acknowledged that he executed the foregoing instrument for and in behalf of said partnership.

/Signature/
Robert Paul Dillon, Notary Public, State of New York
No. 30-6035135
Qualified in Suffolk County
Term Expires March 30, 1996

SCHEDULE "A"
MAP OF PROPERTY

—271



MAP OF PROPERTY
TUTHILL ASSOCIATES
REMSENBURG
TOWN OF SOUTHAMPTON SUFFOLK COUNTY, N.Y.

BEST AVAILABLE COPY

MOTION FILED
JUN 16 1997

(2)

No. 96-1852

In the

Supreme Court of the United States

October Term, 1996

DOROTHY A. BASILE,
Petitioner,

v.

TOWN OF SOUTHAMPTON,
Respondent.

On Petition for Writ of Certiorari
to the Court of Appeals
for the State of New York

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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32 pp

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of the petitioner, Dorothy A. Basile. Consent to the filing of this brief has been granted by counsel for petitioner and has been lodged with the Clerk of this Court. Respondent, the Town of Southampton, has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF)[1] is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief amicus curiae in this case.

PLF has participated in numerous cases involving constitutional protection of property rights before this Court. Particularly noteworthy of PLF's involvement in land use and the Takings Clause cases, PLF attorneys were counsel of record in

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Nollan v. California Coastal Commission,[2] and *Suitum v. Tahoe Regional Planning Agency*.[3] PLF attorneys also represent petitioners in two closely related cases, *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*[4] and *Kim v. City of New York*.[5] PLF participated as amicus curiae in *Agins v. City of Tiburon*,[6] *Keystone Bituminous Coal Association v. DeBenedictis*,[7] *Hodel v. Irving*,[8] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[9] *Lucas v. South Carolina Coastal Council*,[10] *Dolan v. City of Tigard*,[11] and *Babbitt v. Youpee*.[12]

PLF seeks to augment the argument in support of the petitioner. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional needed viewpoint with respect to the issues presented by this case.

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[2] 483 U.S. 825 (1987).

[3] 65 U.S.L.W. 4385 (U.S. May 27, 1997) (No. 96-243).

[4] Appeal docketed, No. 96-1880.

[5] Appeal docketed, No. 96-1794.

[6] 447 U.S. 255 (1980).

[7] 480 U.S. 470 (1987).

[8] 481 U.S. 704 (1987).

[9] 482 U.S. 304 (1987).

[10] 505 U.S. 1003 (1992).

[11] 512 U.S. 374, 114 S. Ct. 2309 (1994).

[12] __ U.S. __, 117 S. Ct. 29 (1997).

For the above reasons, Pacific Legal Foundation requests that its motion to file the following brief amicus curiae be granted.

DATED: June ___, 1997.

Respectfully submitted,

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By _____
JAMES S. BURLING

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Pacific Legal Foundation

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Agins v. City of Tiburon, 447 U.S. 255 (1980) ii

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Anello v. Zoning Board of Appeals of Village of Dobbs Ferry, 1997 WL 68232 (N.Y. Feb. 18, 1997), *appeal docketed*, No. 96-1880 (U.S. May 26, 1997) ii,3,8-10

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City of Cincinnati v. Louisville & Nashville Railroad Co., 223 U.S. 390 (1912) 6

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Daniels v. State Road Department, 170 So. 2d 846 (Fla. 1964) 6

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994) ii

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Kaiser Aetna v. United States, 444 U.S. 164 (1979) 11

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Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982) 11,18

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Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ii,5,8,11,13-15

Moroney v. Mayor and Council of the Borough of Old Tappan, 633 A.2d 1045 (1993), *cert. denied*, 642 A.2d 1004 (1994) 4,14

Nixon v. United States, 978 F. 2d 1269 (D.C. Cir. 1992) 11

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Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ii,12

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 5 9,14

Perry v. Sindermann, 408 U.S. 593 (1972) 11

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) 12,14-16

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 11

Riggs v. Township of Long Beach, 538 A.2d 808 (N.J. 1988) 7

Suitum v. Tahoe Regional Planning Agency, 65 U.S.L.W. 4385 (U.S. May 27, 1997) (No. 96-243) ii

United States v. 15.65 Acres of Land in Marin County, 689 F.2d 1329 (9th Cir. 1982) 4

United States v. 50 Acres of Land, 469 U.S. 24 (1984) 7

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United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961) 5,7,12

Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1795) 6

Vatalaro v. Department of Environmental Regulation, 601 So. 2d 1223 (5th Dist. Fla. 1992), *review denied*, 613 So. 2d 3 (Fla. 1992) 4

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 18

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Miscellaneous

1 Edward Coke, Institutes (1st Amer. ed. 1812) 12

Friedrich A. Hayek, The Road to Serfdom (1944) 12

Walter Lippmann, The Method of Freedom (1934) 13

Nichols on Eminent Domain, 3d ed., Vol. 4 5

Nichols on Eminent Domain (rev. 3d ed. 1996) 6

Robert Nozick, Anarchy, State, and Utopia (1974) 12

Zoning as a Factor in Determination of Damages in Eminent Domain, 9 ALR 3d 291 5

QUESTION PRESENTED FOR REVIEW

May a state take private property by condemnation and deny the landowner-condemnees just compensation by precluding them from presenting evidence of the value of the condemned property independent of the impact of confiscatory land use restrictions that were adopted before the owner-condemnees acquired title?

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.[1]

STATEMENT OF THE CASE

In 1980, Mrs. Basile's family acquired 12 acres of residentially zoned property in the Town of Southampton. Petition for Writ of Certiorari at Appendix (App.) A-1. The land was subject to state and municipal land use restrictions based on its location within wetlands and floodplain overlay districts. App. A-1-2. Under an existing covenant, permission from the Southampton Planning Board would be required before a home could be constructed on the land. App. A-2.

In 1990, the Town of Southampton condemned Mrs. Basile's land. The Town valued the land at $117,500, based upon the existence of wetlands restrictions which were alleged to have precluded residential development. App. A-13. Experts for Mrs. Basile appraised her lot at $960,000, the value of the lot without the restrictions. The trial court limited Mrs. Basile's condemnation award to the lesser amount. App. A-17. Rejecting Mrs. Basile's appraisal, the court noted that she acquired her property after the imposition of regulations

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity, other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

which restricted the land to "recreational or aesthetic purposes." App. A-17.

The Supreme Court, Appellate Division, affirmed the lower valuation of Mrs. Basile's lot. App. A-9. The appellate court observed that the land use restrictions precluded Mrs. Basile from building on her lot. Therefore, she

> did not have any reasonable investment-backed expectation of building on the property, the potential of building on the property was not part of her title to begin with, and there was no categorical regulatory taking.

App. A-10. Citations omitted.

The New York Court of Appeals affirmed, observing that the valuation of condemned property should reflect existing restrictions. App. A-3. The court also noted that property interests are *redefined* by land use restrictions. *Id.*

> Whatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by [Mrs. Basile] who took title after the redefinition of the relevant property interests.

Id.

REASONS FOR GRANTING THE WRIT

SUMMARY

The New York Court of Appeals ruled that Mrs. Basile was not entitled to payment of the fair-market value of her land condemned by the Town of Southampton. Although the application of the restrictions denied Mrs. Basile all but "recreational or aesthetic" uses of her land, the court held that she did not have the right to challenge the restrictions because she acquired her property after the land use restrictions were enacted. The New York court has thereby determined that one of the most essential

of all property rights–the right to use–may be eliminated by legislative enactment. Furthermore, when the Town of Southampton used these legislative enactments to render useless and devalue Mrs. Basile's land, which it thereafter condemned, the town had only to pay a fraction of the true value of her land, thereby avoiding the constitutional requirement of just compensation. The New York court has thereby undermined an essential premise in condemnation law that the price the government must pay for land it takes is the fair-market value–the amount for which a willing buyer would purchase the property.

On the same day the Court of Appeals decided Mrs. Basile's case, New York's highest tribunal also decided three other cases on essentially identical grounds.[2] Together these decisions establish what amounts to a judicial doctrine that property rights can be transferred by legislative *fiat* to the state without payment of just compensation.[3]

The New York court's doctrine is antithetical to deeply rooted understandings of the relationships that define *property*. The New York court's treatment of these understandings

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[2] *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, 1997 WL 68232 (N.Y. Feb. 18, 1997), *appeal docketed*, No. 96-1880 (U.S. May 26, 1997); *Gazza v. New York Department of Environmental Conservation*, 1997 WL 68590 (N.Y. Feb. 18, 1997), and *Kim v. City of New York*, *supra*. The New York court's *per se* rule that land use restrictions can be insulated from challenge once property is transferred was applied to each of these cases, resulting in the owners being denied the ability to make economically beneficial use of their property or being forced to suffer an occupation without receiving just compensation.

[3] Less than one week after the Court of Appeals crafted its doctrine, lower courts began applying and extending it. In *Brotherton v. Department of Environmental Conservation of the State of New York*, No. 12809-90 (N.Y. Feb. 24, 1997), a trial court held that an owner who was precluded from making any economical use of his land had no protected property interest because restrictive regulations were adopted prior to the property's transfer from a wholly owned corporation to the firm's sole shareholder. *The sole legal ground cited for this decision was the new doctrine of the Court of Appeals which is the subject of the present petition.*

is contrary to that of at least four other states' courts–Florida, Massachusetts, Michigan, and New Jersey–which have demonstrated a respect for the principles upon which our takings jurisprudence has been based.[4] The doctrine is also inconsistent with long-standing policies permitting owners of condemned private land to present evidence of the value of their land in the absence of land use restrictions that have a probability of being changed.[5] Although Mrs. Basile's case does not involve a

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[4] *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229 (5th Dist. Fla.), *review denied*, 613 So. 2d 3 (Fla. 1992) (a property owner entitled to compensation under Fifth Amendment where permit request to build home in residentially zoned land denied, based on the property's status as a wetlands); *Lopes v. City of Peabody*, 595 N.E.2d 812 (1992), *review denied*, 600 N.E.2d 171 (1992), *cert. granted and judgment vacated*, 507 U.S. 981 (1993), *on remand*, 629 N.E.2d 1312, 1314-15 (1994) (purchaser of land subject to land use restriction at the time of purchase has every right to challenge the continued application of the restriction); *K&K Construction, Inc. v. Department of Natural Resources*, 551 N.W.2d 413 (1996), *leave to appeal granted*, 106712 (Mich. Sup. Ct. Apr. 28, 1997) (timing of a regulation and acquisition of property cannot act to preclude just compensation where it would otherwise be due); *Moroney v. Mayor and Council of the Borough of Old Tappan*, 633 A.2d 1045, 1048 (1993), *cert. denied*, 642 A.2d 1004 (1994) (property owners "stand in the shoes of their predecessors in title" to challenge local zoning ordinance).

[5] *See, e.g., United States v. 15.65 Acres of Land in Marin County*, 689 F.2d 1329, 1333 n.3 (9th Cir. 1982); *Government of Virgin Islands v. 2.7420 Acres of Land*, 411 F.2d 785, 786 (3d Cir. 1969) (evidence of value for use prohibited by existing zoning admissible where change in zoning restrictions was reasonably probable in the reasonably near future); *Wolff v. Commonwealth of Puerto Rico*, 341 F.2d 945, 946 (1st Cir. 1965) (highest and best possible use of property is not confined to the use or zoning at the time of taking if zoning may be amended to permit other uses).

> When "there is a possibility or probability that the zoning restriction may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value."

(continued...)

challenge raising the probability of change, she did base her higher valuation of her condemned land on the allegation that the land use restrictions as applied to her property would in all likelihood be ruled unconstitutional. App. A-15. Under the court's doctrine, neither of these types of postregulation challenges–those based on likelihood of change or on the likelihood of successful challenge–could be brought by property owners acquiring their land after the adoption of land use restrictions.

Furthermore, the doctrine will prevent property owners from being able to challenge preexisting regulations which have the effect of depressing the value of condemned land.[6] The doctrine leaves a government unconstrained to redefine property interests without regard for constitutional limits,[7] and threatens to render a nullity the Takings Clause of the Fifth Amendment to the United States Constitution.

It is imperative that this Court grant certiorari to reconcile the conflicts created by this New York decision and restore fundamental rights eliminated by the New York doctrine.

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[5] (...continued)
NICHOLS ON EMINENT DOMAIN, 3d ed., Vol. 4, § 12.322, *quoted in Wolff*, 341 F.2d at 946-47. *See also* ZONING AS A FACTOR IN DETERMINATION OF DAMAGES IN EMINENT DOMAIN, 9 ALR 3d 291, 309.

[6] In *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961), this Court noted that "it would be manifestly unjust to permit a public authority to depreciate property values ... and then to take advantage of this depression in the price which it must pay for the property when eventually condemned. *Id.* at 636. Citations omitted.

[7] *See Lucas*, 505 U.S. at 1014 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) (warning that such powers to redefine property must be constrained by constitutional limitations. Otherwise, the tendency would be to increasingly qualify uses of private property until none remained)).

I

THE DOCTRINE OF THE NEW YORK COURT OF APPEALS UNDERMINES THE CONSTITUTIONAL OBLIGATION THAT JUST COMPENSATION–THE FAIR-MARKET VALUE–BE PAID WHEN PRIVATE PROPERTY IS CONDEMNED

"Eminent domain" is the fundamental power of the sovereign to take private property for a public use without the owner's consent.[8] The power of eminent domain is an inherent attribute of sovereignty not derived from the Constitution.[9] However, when this power is exercised, the government is obligated under the Fifth Amendment to the Constitution of the United States[10] to pay just compensation to the owner of the property taken.[11]

When private property is taken for public use, this Court has long held that just compensation must be paid.[12] The amount of compensation is based on the value of the property taken, not

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[8] 1 NICHOLS ON EMINENT DOMAIN § 1.11 (rev. 3d ed. 1996).

[9] *See, e.g., Kohl v. United States*, 91 U.S. 367, 371 (1875) (right of eminent domain exists in the United States government); *City of Cincinnati v. Louisville & Nashville Railroad Co.*, 223 U.S. 390, 400 (1912) ("[T]he right of every state to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions."); *Daniels v. State Road Department*, 170 So. 2d 846 (Fla. 1964) (power of eminent domain not derived from constitution).

[10] The Fifth Amendment provides in part that "private property [shall not] be taken for public use without just compensation."

[11] *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 9 (1984). The Takings Clause of the Fifth Amendment is applicable to state and local government via the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235-37 (1897).

[12] *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 315 (1795).

any "out of pocket" investment lost by the owner.[13] No matter what Mrs. Basile paid for her land, even if she had acquired it for no consideration, the Fifth Amendment's requirement of "just compensation" would require that she be paid its fair-market value.[14]

However, this Court has deviated from this rule, for instance,

> when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.[15]

Injustice is found where the police power has been used to systematically reduce the value of land in anticipation of its condemnation.[16] In this case, it would be manifestly unjust to permit the Town of Southampton to depreciate Mrs. Basile's land by limiting its uses to recreational or aesthetic purposes and then take advantage of this depreciation when her land is condemned.[17] This is precisely what was done when the New York Court of Appeals refused to permit Mrs. Basile to challenge the valuation of her land based on the application of restrictions which deprived her of all but recreational or aesthetic uses of her land.

The land use restrictions applied to Mrs. Basile's property precluded all but aesthetic–nondevelopment–uses of her

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[13] *United States v. 50 Acres of Land*, 469 U.S. 24, 25-26 (1984) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943) ("what a willing buyer would pay in cash to a willing seller")).

[14] In most cases, just compensation means the fair market value of the property–what a willing buyer would pay in cash to a willing seller–on the day it is appropriated. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979).

[15] *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950); *Kirby Forest Industries*, 467 U.S. at 10 n.14.

[16] *See, e.g., Riggs v. Township of Long Beach*, 538 A.2d 808 (N.J. 1988).

[17] *See Virginia Electric & Power Co.*, 365 U.S. at 636.

land. In *Lucas*, this Court explicitly held that regulations that deny all beneficial use of land are categorical violations of the Takings Clause.[18] With very limited exceptions, the government may not avoid the obligation to pay just compensation when land use regulations render private property useless.[19]

Under the doctrine crafted by the New York court, Mrs. Basile is not entitled to just compensation based on a valuation that ignores the confiscatory land use restrictions–simply because she acquired the property after the restrictions were adopted. The application of this rule to Mrs. Basile precluded her from introducing evidence of the value of her land that existed prior to adoption of the confiscatory regulations that she alleged were unconstitutional under this Court's *Lucas* opinion.

The result in this case is manifestly unjust; the result of the application of the subject land use restrictions is to render land useless. Under this Court's decision in *Lucas*, regulations that preclude all but aesthetic uses of land constitute categorical takings of private property. However, the New York court precludes landowners from challenging as takings land use restrictions enacted before they acquire their property, even when the restrictions preclude all economically viable uses[20] of, or allow the government to occupy, private property.[21]

By precluding landowners from bringing takings challenges to land use restrictions in effect when the property is acquired, the New York court has allowed the government, in anticipation of acquiring property, to enact restrictions or deny

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[18] *Lucas*, 505 U.S. at 1015.

[19] *Id.*

[20] *See, e.g., Anello v. Village of Dobbs Ferry, supra*, in which the New York court precluded a challenge to land use restrictions that precluded all use of private land.

[21] *See, e.g., Kim v. City of New York, supra*, in which the New York court precluded landowners from preventing the city from permanently occupying their land.

uses of land merely for the purpose of decreasing land values and concomitantly lowering acquisition costs in eminent domain proceedings.

Beyond *Anello* and *Gazza*, where property owners were denied the ability to use their land, the court expanded the doctrine in this case to deny just compensation when land is condemned. The court discarded universally accepted principles of condemnation law that when the government takes land, it must pay the same as any willing buyer so that the property owner is made whole.[22]

Justice Holmes observed that

> [t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without [just] compensation.[23]

The New York court's newly crafted doctrine precludes property owners from challenging land use restrictions adopted before they acquire their land. Under this new doctrine, the government can render Mrs. Basile's property utterly useless through regulation, depress its value to insignificance, and then take the property through condemnation for a pittance of its nonregulated value. This new, unprecedented doctrine makes a mockery of the Just Compensation Clause and must be reviewed by this Court.

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[22] In *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973), this Court held that "'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."

[23] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.

II

THE NEW YORK COURT OF APPEALS ALTERS FUNDAMENTAL PROPERTY RIGHTS IN A MANNER INCONSISTENT WITH THE UNITED STATES CONSTITUTION AND THE DECISIONS OF THIS COURT

In *Gazza v. New York State Department of Environmental Conservation*, decided the same day as *Basile*, the New York Court of Appeals held that all existing land use regulations formed part of Mr. Gazza's title to his land, limiting the interests upon which he could base any claim. As a result, the court left him without a remedy when he was precluded from building a home on his residentially zoned lot. Similarly, in *Anello v. Village of Dobbs Ferry*, the court's holding rendered Mrs. Anello's residential lot useless; in *Kim v. City of New York*, the court's holding left Mrs. Kim powerless to prevent the city from permanently occupying her land.

While the physical invasion in *Kim* represents the most obvious manifestation of the error in the New York court's doctrine, this case represents a logical (but illegitimate) extension of the court's doctrine as applied in the regulatory takings analyses found in *Gazza* and *Anello*. Once regulations have rendered property all but valueless, is there any reason why a condemnor should pay the preregulation fair-market value of the land? In Mrs. Basile's case, the New York courts issued a resounding "no." The issues in this case are in many ways similar to those in *Gazza* and *Anello*. However, in this case, the courts allowed the definition of property to be altered to preclude all uses of Mrs. Basile's land and then allowed the government to take it in what amounts to a fire sale.

In its amicus brief in support of Mr. Gazza, Pacific Legal Foundation argued, among other things, that the government should not be permitted to redefine the range of interests that constitute property, thereby precluding many landowners from challenging restrictions that deprive them of their property in derogation of the Fifth Amendment's Takings Clause. In the

following portion of this brief, amicus reiterates and amplifies those legal arguments as they apply to this different factual situation.

A. Property Consists of Constitutionally Protected Relationships

This Court has never explicitly defined *property*, instead defining "the range of interests [qualifying] for protection as 'property'" based on "existing rules or understandings" stemming from sources independent of the Constitution.[24] *Property* is understood to mean

> the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. ... The constitutional provision is addressed to every sort of interest the citizen may possess.[25]

The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well-grounded to support a claim of entitlement.[26] These claims for which the owners were entitled to protection have attached to a

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[24] *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1030 (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

[25] *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 n.6 (1980); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

[26] *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (property consists of recognized expectancies); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (property involves mutually explicit understandings). *See also Nixon v. United States*, 978 F.2d 1269, 1275-76 (D.C. Cir. 1992).

wide variety of things[27] and varying degrees of possessory interests.[28]

A cornerstone of any meaningful regime of private property is the recognition that the right to use property is an inherent attribute of ownership.[29] If this recognition is denied, then the ability to use property is no more than a government privilege or entitlement. Property ownership without the right of use would be an empty formalism, incapable of performing its crucial social function of providing a bulwark of personal autonomy against the encroachments of an aggressive, over-reaching state.[30]

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[27] *Board of Regents of State Colleges v. Roth*, 408 U.S. at 571-72) (property interests extend well beyond actual ownership of real estate, chattels, or money). *See also Florida Rock Industries v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

> Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory.

Id. at 1572.

[28] *See, e.g., United States v. Virginia Electric & Power*, 365 U.S. at 638 (Douglas, J., concurring) (Owners of an easement and subservient fee have parts of the bundle of rights or possessory interests that represent "property" within the meaning of the Fifth Amendment.); *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (owners of reversionary interest in easement entitled to just compensation when government took interest). *See also* 1 EDWARD COKE, INSTITUTES ch. 1, § 1 (1st Amer. ed. 1812). "For what is the land but the profits thereof[?]"

[29] *See Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's property ... cannot remotely be described as a 'governmental benefit.'"). *See, e.g.*, Robert Nozick, *Anarchy, State, and Utopia* 171 (1974) ("[t]he central core of the notion of a property right in X ... is the right to determine what shall be done with X"); *United States v. Causby*, 328 U.S. 256, 261 (1946).

[30] *See* Friedrich A. Hayek, *The Road to Serfdom*, 103-04 (1944) (system of private property rights assures "that nobody has complete power over us, that we as individuals can decide what to do with ourselves").

> [T]he only dependable foundation of personal liberty is the personal economic security of private property ... That is why the Englishman's belief that his home is his castle and that the king cannot enter it ... [is] the very essence of the free man's way of life.[31]

When the New York court held that all existing land use regulations formed part of Mrs. Basile's title to her land and thereby limited the evidence she could present in support of her valuation of her land when it was condemned, the court redefined property. This redefinition frustrates mutually reinforcing understandings that are property's essential character. It places the value of her land in the hands of those who wish to take it from her and undermines the very essence of the Fifth Amendment's guarantee of just compensation.

B. Property Is Not Defined Each Time Property Is Transferred But Rather When the Fundamental Relationships Are First Established

"Individual freedom finds tangible expression in property rights."[32] However the power of the state to alter the definition of *property* must have certain constitutional limits if property rights are to have any sense.

In *Lucas*, this Court observed that the Fifth Amendment's just compensation requirement is triggered when "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the] title to begin with."[33]

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[31] Walter Lippmann, *The Method of Freedom* 100-02 (1934), *quoted in Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 n.8 (Fed. Cir. 1994).

[32] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

[33] *Lucas*, 505 U.S. at 1027.

Property is defined when the relationships between specific people and the things they own are first recognized by law. However, the New York court's doctrine ignores the importance of this instant in a title's history. Instead, the court redefines each successive owners' title by all laws in effect on the date the title was transferred. This practice renders any "antecedent inquiry" under *Lucas* meaningless since, according to the lower court, antecedent is no further back in time than the moment the property was last acquired. This doctrine reaches an illogical result, inconsistent with long-standing principles of property law, as well as the holdings of this Court and the Court of Appeals for the Federal Circuit.[34]

When property is transferred without any interests being retained by the prior owner, the new owner is said to "stand in the shoes" of the predecessor in interest.[35] It is fundamental that as the cycle of property transfer is repeated, the property remains unaltered as the owners are substituted, one for another.

However, reliance on fundamental principles seems misplaced if every land use restriction alters the title at the instant land is transferred from one owner to another. Under the New York court's doctrine, the state takes from the new owner part of the "bundle" of rights whenever property changes hands. As a result, the state would never have to pay just compensation for the portions of property taken before land was transferred. Over time, either transfer of ownership will cease or the state will acquire all of the interests it desires in property by operation of law. With the same passage of time, owners will lose any basis for bringing takings claims under the Fifth Amendment as their titles lose meaning with every transfer.

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[34] *See Pennsylvania Coal* and *Lucas*, discussed *ante*; and *Preseault*, discussed *infra*.

[35] *Graff v. Smith's Admors*, 1 U.S. 481, 485 (1789). *See also Moroney*, 633 A.2d at 1048 (property owners, just like their predecessors in title, can challenge local zoning ordinance).

The New York court's doctrine permits government to engage in regulatory incrementalism, eventually depriving owners of all interests in their private property without paying just compensation. Under the lower court's logic, the government could annually increase set-back requirements by six inches, each year reducing the amount of land on which an owner could build a home until eventually nothing was left. Only the increases since the property was last transferred would be relevant to a takings analysis. But the proper analysis would involve a comparison of the total cumulative regulatory impact on property to the original title, regardless of when and how often the land may have been transferred.

In *Lucas*, this Court noted that the government could prohibit uses of land without implicating the constitutional requirement to pay just compensation[36] only if "the use of these properties for what are now expressly prohibited purposes was *always* unlawful."[37] The land use restrictions that would meet *Lucas'* test of constitutionality would not create new limitations on existing titles but, instead, merely recognize historically prohibited uses.[38] The restrictions would do no more than state that which the owners were never free to do with their land.

What *Lucas* implied, the Court of Appeals for the Federal Circuit has expressly stated. In *Preseault v. United States*, the

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[36] *Lucas*, 505 U.S. at 1029.

> On this analysis, the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.

Id.

[37] *Id.* at 1030 (emphasis added).

[38] *Id.*

Federal Court held that property owners could challenge the conversion of easements dedicated for railroad rights of way to bicycle and hiking trails, even though the law under which the easements were converted was enacted before the property owners acquired their property.[39]

Under reasoning strikingly similar to that of the lower court in this case, the United States argued that the Preseaults' property interests in the tract were not defined when the railroad acquired its rights-of-way in 1899, but by the evolving enactment and implementation of law between 1899 and the dates the Preseaults acquired the land.[40]

The Federal Circuit Court of Appeals categorically rejected the thesis that general legislation enacted after the creation of the property interests "somehow redefined state-created property rights and destroyed them without entitlement to compensation."[41] Rather, the rights were defined by the original conveyances and remained unchanged notwithstanding subsequent regulatory enactments.[42] Specifically, the federal court stated that

> [t]he question of what estates in property were created by these turn-of-the-century transfers to the Railroad requires a close examination of the conveying instruments, read in light of the common law and statutes of Vermont *then in effect*.[43]

Property owners in New York have always enjoyed the right to buy and sell land. Before the lower court crafted its doctrine, new owners acquired all of the bundle of rights

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[39] *Preseault*, 100 F.3d at 1530-31.

[40] *Id.* at 1537.

[41] *Id.* at 1530.

[42] *Id.* at 1537.

[43] *Id.* at 1534 (emphasis added).

previously enjoyed by the old owners.[44] When Mrs. Basile purchased her land, she should have acquired the very same protectable interests enjoyed by her predecessors in interest–but the court below declared that she did not.

The New York court's doctrine upsets this historically rooted understanding of property rights. The doctrine precludes Mrs. Basile from receiving just compensation when her property is condemned because the doctrine bars consideration of potential challenges to regulations that preclude all use of her land but were adopted before she acquired her lot. Furthermore, the doctrine permits the state to devalue property by eliminating all productive uses and then condemning the land and paying only a small fraction of the land's true value.[45] Such a doctrine should be reviewed by this Court.

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[44] In *Douglaston Manor, Inc. v. Bahrakis*, 678 N.E.2d 201 (N.Y. 1997), decided shortly before this case, the New York Court of Appeals observed that

> the desirable definiteness attendant upon discrete property rights and principles, along with reliable, predictable expectations built upon centuries of precedent, ought not be sacrificed to the vicissitudes of unsupportable legal theories.

Id. at 205.

[45] As demonstrated by the facts of this case, the New York court's theory is that any land use that is subject to discretionary government approval is deleted from the title when it passes from one owner to another; only uses *of right* may pass with the title. Under this theory, a legislature could pass laws eliminating all uses of land *of right*. If land were thereafter transferred and then condemned, it would have little if any value because the owner's title would include no rights of use. Consistent with the New York court's theory, the comprehensive land use regulations existing in many jurisdictions which are tantamount to the elimination of all uses *of right* would abrogate any obligation under the Fifth Amendment to pay just compensation when private property is condemned.

C. The Government Cannot Deprive Owners of Expectancies Based on Established Property Relationships Without Triggering Fifth Amendment Liability

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, this Court stated that the government does not have unlimited power to redefine the sphere of interests defining private property, the power "by *ipse dixit* [to] transform private property into public property without compensation."[46] No state has the right to destroy expectations based on long-established relationships between people and things, "defeat[ing] the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."[47]

One of the reasons for this rule is to prevent the government, under the rationale of adjusting the benefits and burdens of economic life, from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[48]

In this case, however, the New York Court of Appeals ignored this fundamental principle of United States Supreme Court property law and told Mrs. Basile that she never possessed the right to use her property except for recreational or aesthetic purposes. The court decreed that Mrs. Basile was entitled neither to use her land for purposes consistent with its residential zoning nor to just compensation for the forced dedication of her lot for a public purpose–essentially undevelopable open space.

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[46] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). *See also Loretto*, 458 U.S. at 439.

[47] *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

[48] *Webb's Fabulous Pharmacies*, 449 U.S. at 163 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Under the New York court's holding, the state is free to ignore long-standing expectations of rights in private property protected under the Fifth Amendment to the United States Constitution. Under the court's holding, the state is free by *ipse dixit* to transform without paying just compensation private property into public property with every land transfer. Such a ruling conflicts with this Court's precedent and requires review.

CONCLUSION

The New York court's doctrine unilaterally redefines property, thereby depriving individuals of fundamental constitutional rights. The court permits the state to convert private property into public property without paying just compensation. The court sets aside long-standing principles that, in instances of eminent domain, the government must make the landowner whole by paying the fair-market value of the property taken. Only this Court can resolve the serious conflicts created by the New York court and undo the damage inflicted upon important constitutional rights. For the reasons stated above, the petition for writ of certiorari should be GRANTED.

DATED: June, 1997.

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No. 96-1852

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In The

Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY A. BASILE,

Petitioner,

against

TOWN OF SOUTHAMPTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1.

Whether the petition for certiorari should be denied where the Court of Appeals decision rests on independent and adequate state grounds - namely that the value of land taken in condemnation shall reflect the applicable wetland restrictions where claimant's property interest was encumbered by covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel?

2.

Whether the petition for certiorari should be denied where the Court of Appeals decision poses no conflict regarding a substantial federal question of federal law, nor conflicts with the decisions of another state court of last resort, or this Court?

3.

Whether the petition for certiorari should be denied where neither the Court of Appeals decision, nor the record below raises the alleged questions presented in the petition?

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In The

Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY A. BASILE,

Petitioner,

against

TOWN OF SOUTHAMPTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioner Dorothy A. Basile incorrectly invokes the jurisdiction of this Court under 28 U.S.C. §1257(a). As more fully explained below, the decision of the New York Court of Appeals is based solely on a ruling that the valuation of petitioner's property in a condemnation proceeding shall be based upon its use as restricted by applicable land use regulations. Petitioner had no property right recognized by state law to develop her property since her title was encumbered by a covenant entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel. Petitioner's claims under the Fourteenth

Amendment of the United States Constitution are new and were never reviewed by the New York courts.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Contrary to Petitioner's assertions, the relevant constitutional provisions involved in the New York Courts are Article 1, Section 7 of the New York State Constitution and the Just Compensation Clause of the Fifth Amendment of the United States Constitution. No one statute was directly involved in this case. Rather, several statutes and a covenant affecting the property were identified below, but petitioner did not challenge the constitutionality of any of them. Petitioner for the first time submits copies of Article 25 of the New York State Environmental Conservation Law and portions of the Southampton Town Code. Although relevant, the constitutionality of these statutes was not challenged below. Several other applicable Federal, State, County and Town statutes and regulations are just as relevant, but were not challenged below. These statutes and regulations are identified herein and in the record.

COUNTER-STATEMENT OF CASE

Certiorari should be denied pursuant to Rule 10 of this Court. The petitioner's claims do not involve an "important question of federal law", nor do the decisions relied on below conflict with any decisions of another state court of last resort, any decisions of the United States Court of Appeals, or any decisions of this Court. Furthermore, the alleged questions presented in the petition were neither raised in the record or

decisions below. Question one is inappropriate as it omits key facts regarding the origin of the alleged property interests taken and there has been no finding by the State court that the applicable restrictions have destroyed all value of the property. Question two is inappropriate because petitioner throughout the proceedings below did not challenge the constitutionality of certain restrictions affecting her property and was never denied the right to do so. Question three is a purely factual inquiry never raised by petitioner below.

In essence, petitioner attempts to "bootstrap" her factual assertions of value in a condemnation claim with the three other unrelated cases[1] which involve challenges to specific statutes as "regulatory takings." This case, however, originates from the Town of Southampton's *de jure* taking of petitioner's property pursuant to formal condemnation proceedings under New York State's Eminent Domain Procedure Law. Petitioner's claim at trial was that pursuant to New York State law, property taken in condemnation should be valued as restricted by the applicable wetland regulations with an increment for the reasonable probability of a successful judicial challenge to the regulations' application as confiscatory. Petitioner, without even identifying or challenging the applicable restrictions, asked the New York Court to assume that any and all restrictions would be found unconstitutional, to wit: the restrictions deny her of all economically beneficial or productive use of the land.

1

Gazza v. NYSDEC, 2 No. 10, 1997 WL 68590 (N.Y. Feb. 18, 1997); *Anello v. ZBA of Village of Dobbs Ferry*, 89 N.Y.2d 535, 184 N.Y.S.2d 656 (1997); *Kim v. City of New York*, 2 No. 8, 1997 WL 58593 (N.Y. Feb. 18, 1997).

Petitioner's value of $960,000 is based upon the potential to develop not just one dwelling, but to create a nine lot subdivision.

The Town, on the other hand, demonstrated, and three New York courts have held that, as a matter of state property law, Petitioner never had a right to unfettered development of the property and that there was no reasonable probability of a successful judicial challenge to the restrictions. The Petitioner conceded and the Town proved that there was no probability that one dwelling, let alone a nine lot subdivision, would be approved for the property due to a certain declaration of covenants and the concomitant land use regulations in place when the subdivision creating the parcel was approved. The New York courts did not establish a rule in this case that a landowner loses a right to challenge a regulation upon the transfer of property to another.

Contrary to Rule 10 of this Court, Petitioner now asks this Court to review the findings of fact and determinations of state property law made by the New York State courts.

STATEMENT OF FACTS

On March 8, 1990, Respondent, Town of Southampton ("Town"), acquired from Petitioner, Dorothy A. Basile ("Basile"), by condemnation, the fee title ownership of a 11.7532 acre wetland parcel located east of Tuthill Lane, north of Moriches Bay, hamlet of Remsenburg, Town of Southampton, County of Suffolk, State of New York.

The Town first appraised the property as of August 1, 1989, in the amount of $128,000.00 and an advance payment

in that amount was made to Basile.[2] (A347) At trial, the Town submitted an updated appraisal valuing the property as of the title vesting date in the amount of $117,500.00. (A416) Basile submitted an appraisal in the amount of $960,000.00. (A288)

Dorothy A. Basile acquired title to the subject premises by virtue of a deed dated March 10, 1989, approximately one year prior to the date of vesting, from Richard B. and Dorothy A. Basile to Dorothy A. Basile alone, for no consideration. (A8a, 15, 358, 416-16) Prior to that transfer, the record shows that title to the property was exchanged several times between members of the same extended family. Each of the transfers were for no consideration. (A8a, 15, 358, 416-16) The Basile family first acquired title to the property by virtue of a deed April 18, 1980 from Tuthill Associates, a partnership, to Richard Basile. (A8a, 15, 358, 416-16) Consideration paid by Richard Basile for this transfer was $88,500.00. (A8a, 15, 358, 416-16)

Petitioner's property was once part of a larger tract owned by Tuthill Associates ("Tuthill"), who sought and were granted approval for a subdivision map by the Planning Board of the Town of Southampton on December 18, 1975. (A432) In that instance, Tuthill sought permission to subdivide the 15.0715 acre tract into 4 parcels - three one-acre building lots and a fourth, a 11.7352 acre tract for future consideration as a building lot. The subject property is shown as Parcel No. 4 on this map. (A424, 432) At the time of the Tuthill subdivision,

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2 The Town has not sought the difference between the advance payment of $128,000 and the award of $117,500 by the Supreme Court. Claimant retains those funds.

the property was constrained by certain state, county and town regulations restricting the development of wetlands. In light of these regulations, the subdivision map was approved with a condition that Tuthill agree to certain covenants. These covenants were recorded in the Suffolk County Clerk's Office at Liber 7974, page 97. (A390) Richard Basile, a real estate investor, was familiar with these covenants and the regulations prior to purchasing the property in 1980. (A7, 19)

The covenant precludes *any development* of the subject property, including the erection of a *single* building or structure, without the prior approval of the Planning Board of the Town of Southampton. (A230, 363, 416-23, 424) Basile's experts ignored the covenant (A165). The covenant states at paragraph 4 *et.seq.* of the first page:

> "WHEREAS, the Planning Board of the Town of Southampton is not willing at this time to approve Parcel No. 4 as described on Schedule A as a building lot because it may consist of wetlands and may not be suitable for erection of a dwelling thereon, and
>
> WHEREAS, the Declarant desires to have Parcels No. 1, 2 and 3 as described on Schedule A approved as building lots at this time, even if said Parcel No. 4 is not suitable for a building lot, and
>
> WHEREAS, the Planning Board of the Town of Southampton is willing to approve said Parcels No. 1, 2 and 3 as building lots, provided that Parcel No. 4 is not approved as a building lot at this time, such that it cannot be built upon without a new application for approval as a building lot

being made to and thereafter approved by the Planning Board of the Town of Southampton" (see also A9)

Furthermore, the covenant states at paragraph number 1 of the second page:

"1. That no building or structure shall be erected on Parcel No. 4 as described on Schedule A, unless and until said Parcel No. 4 is approved as a building lot by the Planning Board of the Town of Southampton." (see also A9)

There is no evidence that Petitioner attempted to ascertain the impact of the covenant or the concomitant regulations. Rather, Petitioner's experts ignored the aforementioned map (A158) and covenant (A165), and generally ignored the Town's land use regulations in establishing the highest and best use of the property. The property is zoned R-40, which permits single family residences on lots consisting of 40,000 sq.ft. and 150 feet of lot width. (A361, 416-43) The property is also located within two special zoning overlay districts, the Tidal Wetland and Ocean Beach Overlay District and the Tidal Floodplain Overlay District (see §§330-39 and 330-42, Town Code). (A416-20) These restrictions limit the type and location of development in and adjacent to tidal wetlands as defined in §330-3 of the Southampton Zoning Code (A112, 400). Approximately ninety-seven (97%) percent of the property is classified as tidal wetlands under this definition. (A263, 400, 415, 421) All of these restrictions existed at the time of subdivision (A263), but none of them were challenged at trial.

Under the best of circumstances, the property would not yield more than one dwelling under the Town Subdivision and Zoning Regulations because of its configuration and because legal access to the public road is limited to only twenty feet in width. (A431) Basile and the Town agreed that it was not reasonable to assume that even a single family dwelling could be built on this property in accordance with Town regulations (A125, 426). Petitioner's surveyor, however, proposes a 9-lot cluster subdivision (A286) based upon a standard yield map. (A284) In preparing these maps, the surveyor basically assumed that the property contained no wetlands. Significantly, the surveyor ignored the yield requirements of §292-10B of the Subdivision Regulations (underwater lands and wetlands areas must be excluded from area contributing to lot yield) (A424, 437) and the required town wetland setbacks and drainage requirements (A437). Also, both maps propose access via a private road to the east, contrary to §280-a of New York State Town Law (which requires suitable access to a public road).

Oddly, petitioner ignored the applicable environmental regulations, but then decided to use the cluster or planned residential development provisions of the regulations (§292-11 and Chapter 247, Southampton Town Code), whose very purpose is to protect the same resources petitioner shuns. (A425) These maps would also create significant drainage issues with respect to the natural flow of water between Moriches Bay and the large wetland area to the north. (A66, 437) Neither map would be approved by the Town. (A426) It was noted that these restrictions existed at the time of the original subdivision (A263), but none were challenged at trial.

Petitioner's experts did not address the impacts of their proposed development on the environment (A92), and failed

to consider the environmental review requirements of the New York State Environmental Quality Review Act (Article 8 E.C.L., 6 NYCRR Part 617, SEQRA) or its local equivalent, Chapter 157 of the Town Code. (A438) These statutes require state agencies to incorporate environmental review in its decision-making and may require an environmental impact statement to be prepared by a developer of wetlands.

Petitioner's experts also failed to address the jurisdictions of the Suffolk County Department of Health Services ("SCDHS") related to water supply and sanitary sewage disposal, the New York State Department of Environmental Conservation ("NYSDEC") under Articles 24 (Freshwater Wetlands) and 25 (Tidal Wetlands) of the New York State Environmental Conservation Law (see 6 NYCRR, Parts 664 & 661, respectively), and the jurisdiction of the United States Army Corp. of Engineers under §404 of the Federal Clean Water Act, [see 33 U.S.C. §§1251-1376 (1982)]. Although the Tidal Wetland Act is mentioned by her appraiser, petitioner introduced no evidence to challenge the constitutionality of this statute as applied to her property, or any of the other regulations.

Petitioner did not challenge the Declaration of Covenants or any Federal, State, County or Town regulations at trial. No claims were made by Petitioner against those governmental entities. Rather, the appraiser assumed that Petitioner was entitled to a subdivision permit, regardless of the covenant and any regulations, because "we have been advised by counsel that, as a matter of law a reasonable probability exists that the legal restrictions could be successfully challenged with regard to the Tidal Wetlands Act, the development would be legally permissible." (A314).

Petitioner introduced no evidence to show that the covenant would be found to be illegal or unconstitutional, or that there was a reasonable probability that even one dwelling, as opposed to a nine lot subdivision, would be approved. Petitioner introduced no evidence to show that she had more than an unilateral expectation or an abstract need to unfettered development of her property, or that a reasonable return on her investment could not be achieved. There is no evidence of market value of the land when it was acquired, other than her husband's purchase price of $88,500.00 in 1980. Petitioner did not and could not introduce any evidence of the market value of the property before the restrictions were imposed without taking into account the impact of the bargained for agreement between the Town and the prior landowner. There is no evidence that the covenant and all of the applicable regulations have destroyed the value of the subject property.

OPINIONS BELOW

A. The Supreme Court's Decision

By Order and Judgment entered in the Clerk of Suffolk County on May 3, 1994 (A2a), and decision dated April 4, 1994 (A6a), Justice Paul J. Baisley of the Supreme Court, Suffolk County, awarded Petitioner, after a non-jury trial, the sum of $117,500.00. Justice Baisley noted that the Court's primary purpose in the proceeding was to determine the just compensation due Petitioner under Article 1, §7 of the New York State Constitution. The Court distinguished the factors present in this case with the state law relied upon by Petitioner in *Chase Manhattan Bank v. State of New York*, 103 A.D.2d 211, 479 N.Y.S.2d 983 (2nd Dept. 1984), *Berwick v. State of New York*, 107 A.D.2d 79, 486 N.Y.S.2d 260 (2nd Dept

1985), and *Berwick v. State of New York*, 159 A.D.2d 544, 552 N.Y.S.2d 409 (2nd Dept. 1990). It found that because the property had been subject to wetland restrictions for a significant period of time, and there was no evidence introduced regarding the value of the property at the time of acquisition, Petitioner's "expert incorrectly assumed that a constitutional challenge to the wetlands designation by the claimant or subsequent transferee would likely be successful." (A6a) Contrary to petitioner's assertions, the Supreme Court did not make a finding that the restrictions destroyed all value of the property.

B. The Appellate Division's Decision

The Appellate Division, Second Department unanimously affirmed the trial court's award based upon the value of the property as restricted by wetlands regulations. Petitioner's counsel argued the unconstitutionally of the State Tidal Wetland Act in his brief and at oral argument, but again failed to identify or address the impact of the covenant and all other concomitant Town regulations.

The Appellate Division in *Basile v. Town of Southampton*, 222 A.D.2d 638, 636 N.Y.S.2d 97, stated that:

> "The claimant's predecessors in interest and the claimant knew, at the time of the purchase/acquisition in 1980 and 1989, that the property was encumbered by wetland restrictions and might not be buildable. Thus, while the claimant conceded and the Town proved that claimant would be denied a permit to build on the property due to wetland restrictions, the Town demonstrated that in light of the declaration and

the wetland mapping, the claimant did not have any reasonable investment-backed expectation of building on her property, the potential of building on the property was not part of her title to begin with, and there was no categorical regulatory taking (see, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003; *Gazza v. New York State Dept. of Envir. Conservation*, _AD2d [2nd Dept. Dec. 4, 1995])." (A444 & 445).

C. The Court of Appeals' Decision

The Court of Appeals affirmed the decision of the Appellate Division, Second Department. In applying existing state property law, the Court found that the facts required that the valuation of petitioner's property should reflect applicable environmental restrictions. Relying on *Matter of Town of Islip v. Mascioli*, 49 N.Y.2d 354, 426 N.Y.S.2d 220, 402 N.E.2d 1123 (1980), which presented a similar issue related to value of property taken in condemnation where a reasonable probability that a court challenge to zoning regulations would entitle landowner to an increment above the restricted value, the court stated:

> "Whatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such claim was not owned by claimant here who took title after the redefinition of the relevant property interests. Moreover, as the concurrence notes, 'the wetlands restrictions at issue in this case did not deprive claimant of any interest in the property

> that had not already been encumbered' by virtue of the covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel."

The concurring opinion noted that:

> "[e]ven if we were to accept claimant's argument that the property must be valued as if it could be developed for one or more single-family residences because the alternative use for recreational or aesthetic purpose is not an economic use (cf., *Lucas v South Carolina Coastal Council*, 505 US 1003, 1044 [Blackmun, J., dissenting]), that is a consequence of the covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel."

The Court of Appeals did not decide that Basile did not have a right to challenge the restrictions because she acquired her property after the land use restrictions were enacted. Rather, both the majority and the concurring opinion similarly conclude that under these factual circumstances, Petitioner cannot claim the value of the property without the environmental restrictions, because an unrestricted right to develop the parcel no longer remained in the "bundle" of rights that she acquired through the former owner.

REASONS FOR DENYING THE WRIT

POINT I

THE DECISION OF THE NEW YORK STATE COURT OF APPEALS IS BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS AND THIS COURT SHOULD THEREFORE DENY THEWRIT FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION.

This Court unwaveringly adheres to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. If the state law determination is sufficient to sustain the judgment, "any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, _U.S._, 1997 U.S. Lexis 2801, 10 (1997).

Thus, where a state court decision indicates with the "requisite clarity" that petitioner's claims were rejected on state law grounds, this Court is without authority to address the federal claim supposedly raised below. *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *International Longshoremen's Ass'n.; AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of

this Court's refusal to decide" such cases. *Michigan v. Long, supra*, 463 U.S. at 1040.[3]

Here, the New York Court of Appeals based its decision in determining the value of property in condemnation on the long standing "reasonable probability - incremental increase" rule as set forth in *Matter of Town of Islip v. Mascioli, supra*; see also *Chase Manhattan Bank v. State of New York, supra, Berwick v. State of New York*, 107 A.D. 2d 79, 479 N.Y.S. 2d 983. This rule has evolved in New York with federal underpinnings.

An owner whose property has been taken as a result of condemnation is entitled to just compensation (U.S Const., 5th Amend.; N.Y. Const., Art. I §7, [a]), which generally is calculated by reference to the fair market value of the property at its highest and best use at the time of appropriation, that is, the price a willing buyer would have paid a willing seller for the property (see *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); *United States v. 564.54 Acres of Land in Monroe and Pike Counties, Pennsylvannia*, 441 U.S. 506, 99 S.Ct. 1854, 60 L.Ed.2d 435 (1979).

That a property is undeveloped at the time of taking does not alter the general rule. Unimproved land must be valued in accordance with the highest and best use for which it is adaptable and available (see *Olson v. United States, supra, Matter of Town of Islip v. Mascioli, supra.*), provided the condemnee establishes as a reasonable probability that such

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3 This Court does, however, assess the sufficiency of the asserted state ground. *International Longshoremen's Ass'n., AFL-CIO v. Davis, supra*, 476 U.S. at 387; *Michigan v. Long, supra*, 463 U.S. at 1038.

use would have been made of the property in the near future and that such use was more than a speculative or hypothetical arrangement (see *United States v. L.E. Cooke Co., Inc.*, 991 F.2d 336 (6th Cir. 1993), *United States v. 15.65 Acres of Land in Marin County*, 689 F.2d 1329 (9th Cir. 1982).

The New York rule, under which petitioner sought to establish the value of her property, states that where the landowner can demonstrate that there is a reasonable probability that a court challenge to zoning or environmental restrictions could succeed, the landowner would be entitled to an increment above the restricted value, which represents the premium a knowledgeable buyer would be willing to pay for potential change to more valuable use (*see Matter of Town of Islip v. Mascioli, supra*; see also *Chase Manhattan Bank v. State of New York, supra.*, *Berwick v. State of New York, supra*).

As the Appellate Division stated in *Berwick v. State of New York*, 486 N.Y.S.2d at 263:

> "[T]he law follows the realities of the market place, which are that a knowledgeable buyer would adjust his purchase price to offset the cost in time and money of applying for a permit and challenging its denial in court as confiscatory. Certainly, a knowledgeable buyer would not pay claimant the full unrestricted residential values of their properties on the day of taking, when wetland restrictions were still legally in effect. He would pay only the value of the property as so restricted, plus some increment representing its enhanced value at such future time when he is successful in nullifying the wetlands restrictions

> in court. . . . [D]ifficulties in securing approval for residential development under local and State tidal wetlands regulations would reduce the desirability of these properties in the market place. That claimants might eventually have secured a judicial declaration of confiscation, compelling the State to compensate them for their loss if a permit was denied, simply cannot be translated into a market value for immediate residential use on the date of taking."

Furthermore, overcompensation is as unjust to the public as undercompensation is to the property owner, and the landowner bears the burden of proving the value of the land, *U.S. v. L.E. Cooke Co., Inc., supra, United States v. 69.1 Acres of Land,* 942 F.2d 290, 292 (4th Cir. 1991).

Thus, petitioner had the burden to show that a reasonable probability existed that the restrictions that would prohibit the development of her property into a nine lot residential subdivision would be found confiscatory. Petitioner failed to meet her burden in a number of ways.

Petitioner did not challenge below the constitutionality of all applicable development restrictions and the declaration of covenants that encumbered the title to her property. Petitioner merely asked the court to assume that there would be a reasonable probability that the State Tidal Wetlands Act would be found unconstitutional and that she would be able to value her property as a nine lot subdivision. Generally, the Constitution leaves the law of real property to the states, *Stevens v. City of Cannon Beach,* 510 U.S. 1207, 114 S.Ct.

1332 (1994). Petitioner's right to subdivide her real property is defined by State and Town regulations,[4] not by federal law nor the Constitution.

Petitioner failed to identify all applicable restrictions and introduced no evidence to show that she had a "right" to build a single dwelling or structure on her property under New York law, let alone subdivide into nine building lots. As the Court found, Petitioner was not deprived of any interest in the property that had not already been encumbered by virtue of the covenants entered into by her predecessor in title in exchange for the right to subdivide and develop what was then a larger parcel. Petitioner's attempts to qualify or interpret the meaning of the covenant at this juncture, without any evidence in the record to substantiate same, is inappropriate.

Thus, the Court of Appeals' determination that defined petitioner's bundle of rights to preclude the potential to develop the property into a nine lot subdivision constitutes adequate and independent state grounds for the judgment below and divests the Court of jurisdiction to hear this case.

The takings issue raised indirectly in this case is a federal question, but the federal aspects of that question are not contested and the issues have already been decided under the precedents of this Court. In particular, the New York courts have correctly interpreted and applied this Court's decision in *Lucas, supra.* While Petitioner, under *Lucas*, has a right to an economic return on her property, the amount of the return is

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4 See New York State Town Law §§276, 277, 278 and Southampton Town Code, Chapters 247 and 292.

limited by the character of the land itself, and the extent of petitioner's rights. In *Lucas*, the Court indicated:

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2899.

Petitioner's arguments failed in the New York courts because the "logically antecedent inquiry" into the nature of petitioner's estate revealed a covenant and concomitant land use regulations which precluded the development of her parcel into nine lots.

Thus, the economic benefit of the parcel that petitioner claims was taken from her did not exist, and the valuation granting petitioner $128,000[5] or a $39,500 return on her family's investment over a ten year period, is reasonable.

Moreover, petitioner could not show the extent to which the restrictions interfered with distinct investment-backed

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5 Town paid an advance payment of $128,000 and Petitioner has retained those funds.

expectations. As Justice Kennedy in his concurring opinion in *Lucas* clarifies:

> "The finding of no value must be considered under the Taking Clause by reference to the owner's reasonable, investment-backed expectations * * * The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property. * * * Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations." *Lucas*, 112 S.Ct. 2886, 2903.

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), the Court noted that reasonable, investment-backed expectation must be more than a unilateral expectation or an abstract need. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Court rejected as "quite simply untenable" the contention that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretobefore had believed was available for development . . ." 438 U.S. at 130 [98 S.Ct. at 2662].

Since *Lucas* requires that the historically rooted expectancy or the "bundle of rights" one acquires as a property owner must be measured as of the time it is acquired, there can be no taking if the court concludes that a reasonable purchaser would not have expected to have unfettered use of the subject

property. Here, the New York courts held that in light of the covenant that advised that the property contained wetlands and was not suitable for development, and the fact that the property was regulated for several years prior to her acquisition, petitioner could not reasonably expect to be able to subdivide her property and claim unfettered use. Therefore, the New York courts correctly interpreted and applied the takings decisions of this Court. As *Lucas* settled this issue, this case presents no substantial federal questions, and there are no special and important reasons for granting certiorari.

POINT II

THE DECISION OF THE NEW YORK STATE COURT OF APPEALS POSES NO CONFLICT REGARDING A SUBSTANTIAL QUESTION OF FEDERAL LAW, NOR DOES IT CONFLICT WITH THE DECISIONS OF ANOTHER STATE COURT OF LAST RESORT, A UNITED STATES COURT OF APPEALS, OR THIS COURT

Rule 10 of this Court's rules states that review of a writ of certiorari is a matter of judicial discretion that will be exercised "only for compelling reasons." Although that rule also advises that a writ may be granted if, *inter alia*, a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort, of a United States Court of Appeals, or of this Court, there is no such conflict here.

As an initial matter, the Court of Appeals' opinion rests solely on an interpretation of state property law, and it therefore does not invoke, much less decide, an important

federal question. In fact, where, as here, the issue involves state-created property rights, "it is appropriate to recognize that in certain instances, different states may define these rights by providing additional protection from government interference." *Stupak-Thrall v. United States*, 89 F.3d 1269, 1270 (6th Cir. 1996) (Nelson Moore, J., concurring), *cert. denied*, _U.S._, 136 L.Ed.2d 711 (1997). Regardless of the Court of Appeals ruling in this case, other states are free to provide that one of the sticks in the bundle of rights that comprise fee simple title to land in that state is the right to subdivide and develop property.

The Court of Appeals' decision poses no conflict that merits this Court's review. In fact, the Court of Appeals' ruling, premised upon the factual assertions regarding the value of property encumbered by a covenant with concomitant land use regulations which preclude all reasonable probability of the development of the property, is in perfect harmony with decisions from other state courts of last resort and the federal appellate courts. *See, e.g., Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (S.C. 1995) (landowner never had the right to fill critical area tidelands on his property because statute in existence when he purchased property in 1987 forbade it without a permit); *Hynziker v. State of Iowa*, 519 N.W.2d 367 (Iowa 1994) (denial of building permit did not constitute unconstitutional taking because plaintiffs took title to their property subject to pre-existing state regulations governing the preservation of ancient burial grounds); *Stevens v. City of Cannon Beach*, 317 Ore. 131, 854 P.2d 449 (1993), *cert. denied* 510 U.S. 1207 (1994) (when plaintiffs took title to their land, they were on notice that, under the state's custom, they did not possess the right to exclusively use their dry sands area); *Just v. City of Marinette County*, 56 Wisc.2d 7, 201

N.W.2d 761 (1972) (statute protecting wetlands prevents the public nuisance that filling or alteration of them would create, and requires no compensation to the owner); *Sibson v. State of New Hampshire*, 336 A.2d 239 (1976) (denial of a wetland permit is a valid exercise of police power and did not require compensation); *Claridge v. New Hampshire Wetlands Board*, 125 N.H. 745, 485 A.2d 287 (1984) (purchaser of land with notice of restrictions to development of tidal wetlands can justify few, if any, legitimate investment-backed expectations of development right which rise to the level of constitutionally protected property rights); *Ciampitti v. United States*, 22 Cl.Ct. 310 (1991) (denial of permit to fill wetlands did not interfere with reasonable, investment-backed expectations and did not require compensation); *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (U.S. Dist. Ct., M.D., Florida, Orlando Div. 1989) (denial of development permit on oceanfront property did not constitute taking requiring compensation); *Leonard v. Town of Brimfield*, 423 Mass. 152, 666 N.E.2d 1300, *cert. denied*, __U.S.__ 117 S. Ct. 582 (1996) (landowner did not have reasonable, investment-backed expectations to subdivide floodplain property and did not require compensation); *Allegria v. Keeney*, 1997 WL 33587 (R.I. Jan. 29, 1997) (purchaser's prior knowledge of wetland restrictions was relevant in determining that purchaser had no reasonable investment-backed expectations of developing property and did not require compensation).

Petitioners nonetheless assert that the Court of Appeals' opinion conflicts with the "regulatory taking" opinions of four state courts (Pet., at 11-17). Notwithstanding that none of these decisions involve a question of value in condemnation, further review of those cases demonstrates that no conflict exists.

The first and only decision of a state court of last resort cited by petitioners, *Lopes v. City of Peabody*, 417 Mass. 299, 629 N.E.2d 1312 (Mass. 1994), stands for the wholly unremarkable proposition that, under Massachusetts law, a property owner is entitled to challenge a pre-existing land use regulation (Pet., at 13). The only issue before that Court was the plaintiff's facial challenge to the regulation, 417 Mass., at 302; 629 N.E.2d, at 1314. That principle has no applicability in this matter, which raises no facial challenge whatsoever.[6] In a footnote (#13 at 417 Mass. 307) in its decision the Massachusetts court noted:

> "... Lopes thus has the burden of showing that the zoning regulation as applied to his property does not substantially advance legitimate State interests . . . He will also have the burden of proving that the zoning regulation has deprived the land of all economically beneficial use. He will have to prove that the use of the property (presumably a single family residence use) is one that is economically feasible and otherwise permitted under various other regulations, including the State sanitary code. On the issue whether that use would constitute a nuisance or some other unlawful use of the land, principles

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6 Indeed, in language petitioners' unaccountably ignore, the *Lopes* Court explicitly acknowledged that "the rights of a subsequent purchaser to takings damages might well stand in a posture significantly different from that of one seeking to have a zoning provision invalidated." 417 Mass., at 303, n.8; 629 N.E.2d, at 1317.

> guiding the placing of the burden of proof may shift that burden to the city or perhaps place on it the burden of going forward to present evidence tending to show that Lope's proposed use would improperly exceed other limits on his right to use his land. At least, in this case, the government must identify background principles of nuisance or property law that prohibit the landowner's proposed use of the property." (citing *Lucas*)

In fact, Massachusetts now recognizes that where a purchaser acquired property in a designated flood plain that was subject to established restrictions on building, she has a right to challenge the continued application of a restriction, but she "may not complain about the loss of a right she never acquired." *Leonard v. Town of Brimfield*, 423 Mass. 152, 666 N.E.2d 1300, 1303 (Mass. 1996), *cert. denied*, _U.S._ 117 S. Ct. 582 (1996). The *Lopes* decision therefore cannot pose any conflict worthy of this Court's review.

Petitioner also erroneously contends that a conflict arises with *K & K Construction, Inc. v. Department of Natural Resources*, 217 Mich.App. 56, 551 N.W.2d 413 (Mich. App. 1996) (Pet., at 14-15), which is not even a decision of state court of last resort. This is an intermediate state appeals court decision. That Court, however, agrees that a regulation must inhere to the owner's title and must be grounded in background principles of nuisance and property law. 217 Mich. App., at 62; 551 N.W.2d, at 417. In that particular case, the Court held that the constitutional provision and legislative preamble relied on by the State to establish those background principles were insufficient to carry the State's burden in this regard. 217 Mich.App., at 62-63; 551 N.W.2d, at 417-18. The Court also

upheld the lower court's discretion as the trier of fact to determine the fair market value of the land with the use restrictions placed on it.

Petitioner also relies on *Moroney v. Mayor*, 268 N.J. Super. 458, 633 A.2d 1045 (N.Y. Super. Ct. App. Div., N.J. 1993) (Pet., at 15-16), another intermediate appellate decision. *Moroney* is not helpful here as it turns on the specific language of the zoning provisions in issue, which expressly states that if a property owner had the right to apply for a hardship variance when the zoning ordinance was enacted, the right passes to a successor in title. 268 N.J. Super., at 464; 633 A.2d, at 1048. Thus, the *Moroney* Court also examined the property owner's bundle of rights in light of existing state law.

The last case petitioner relies on, *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, (Fla. Dist. Ct. App. 5th Dist. 1992), *review denied*, 613 So. 2d 3 (Fla. 1992), is also not a decision of state court of last resort. The *Vatalaro* Court never held as a general rule that the denial of a building permit to one who purchases after restrictive regulations have been adopted is a taking requiring compensation. Rather, the *Vatalaro* court agreed that the wetlands regulations at issue would bar a takings claim where there was a denial of a rezoning or variance application, because the property was purchased in anticipation of a discretionary rezoning application which, if denied, did not affect the landowner's bundle of rights. 601 So. 2d at 1229. However, the Court then distinguished cases involving permit regulations, where the land is purchased "with future development legitimately anticipated and with no existing bar thereto." *Id.* Thus, both the *Vatalaro* court and the New York Court of Appeals

approach the issue similarly by examining the bundle of rights a landowner acquired in light of relevant state law.

The Court of Appeals decision does not conflict with a footnote in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) as petitioner asserts (Pet., at 21). In *Nollan*, this Court held that the state agency could not implement a policy that exacts a public beachfront easement in exchange for a building permit without a showing of a sufficient nexus to a legitimate governmental purpose, even if the landowners knew of that policy when they acquired the property. Here, there is no development exaction at issue.

Lastly, the New York Supreme Court's recent decision in the matter of *Brotherton v. NYSDEC*, Case No. 12809-90 Sup.Ct., Suffolk Cty., IAS 8, 2/24/97 is of no consequence. This case is decided on a similar inquiry into the bundle of rights a landowner acquired in light of relevant state law. In reviewing a denial of a tidal wetland permit by the State, the Court found no regulatory taking had occurred because of the unity in use and ownership with respect to the two parcels in question and found significant value left in the property.

Thus, petitioner has failed to raise a conflict involving a substantial federal question that merits this Court's review, and her writ should be denied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Southampton, N.Y.
June 26, 1997

Respectfully submitted,

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(H)

No. 96-1852

In The

Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY A. BASILE,

Petitioner,

against

TOWN OF SOUTHAMPTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

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OCTOBER TERM, 1996

DOROTHY A. BASILE,

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TOWN OF SOUTHAMPTON,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Court of Appeals of the State of New York, in this *de jure* condemnation case, denied just compensation to Dorothy A. Basile when it limited the value of her land by denying to it any economically viable use. It held that the fundamental property right to an economically viable use, upon sale of the property to her, was not transferred to her along with the title but, instead, was transferred to the Town and State.

Pursuant to Supreme Court Rule 15.6, Mrs. Basile files this reply to the brief filed by the Town of Southampton in opposition to her Petition for Writ of Certiorari.

ARGUMENT

I

STATEMENTS MADE BY RESPONDENT IN ITS BRIEF IN OPPOSITION ARE UNTRUE AND IRRELEVANT

Respondent, (the Town) on page 4 of its Brief in Opposition (O.B.) says that Mrs. Basile conceded that because of the covenant, there was no probability of developing her property. That is not true. There was no such concession. More importantly, the covenant is irrelevant to this appeal. All the covenant states is that in order to build, Mrs. Basile must seek a permit. If requiring a permit were relevant, no property owner could make a takings claim because all property owners must get a permit in order to build.

As to its many statements in its Brief in Opposition regarding challenges to Town and other regulations, throughout its brief, the Town loses sight of the fact that this is a *de jure* condemnation, not an inverse condemnation. No challenge was made to any wetlands regulations nor could there be. Mrs. Basile no longer owned the property. Her position was simply that because any regulation that denies her an economically viable use of her property is unconstitutional, any such regulation would be overturned and the property should be valued on that basis. To do less would be to allow a condemnor to enact regulations to destroy the value of the property, then condemn it and, having caused the destruction, pay some minimal amount, denying to the owners, by the process, just compensation.

II

RESPONDENT'S ARGUMENT THAT THE COURT HAS NO JURISDICTION BECAUSE THE DECISION OF THE COURT OF APPEALS IS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS IS INCORRECT AS A MATTER OF FACT AND OF LAW

The Court of Appeals, in its decision, stated, "Enactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations." That sentence is the essence of the decision. Its reasoning is that the Basiles purchased the property after the enactment of the regulations. The conclusion that there is no taking is a clear application, as the Court of Appeals interprets it, of the takings clause of the Fifth Amendment to the United States Constitution and the regulatory takings decisions of this Court. In all its possible meanings, it involves a federal question and is clearly within the jurisdiction of this Court.

Mrs. Basile sought just compensation under the Fifth Amendment to the United States Constitution. The Town states, in error, that "the Court of Appeals based its decision in determining the value of property in condemnation on the long standing 'reasonable probability-incremental increase' rule as set forth in *Matter of Town of Islip v. Mascioli, supra,* [49 N.Y.2d 354, 426 N.Y.S.2d 220, 402 N.E.2d 1123]; see also *Chase Manhattan Bank v. State of New York, supra,* [103 A.D.2d 211, 478 N.Y.S.2d 983]; *Berwick v. State of New York,* 107 A.D.2d 79, 486 N.Y.S.2d 260." (O.B. 15) That is incorrect. Mrs. Basile sought compensation, asserting that rule, relying on those cases, on the reasonable probability that,

because the wetlands regulations (all of them), denied any economically viable use to the property, they would be overturned as unconstitutional and Mrs. Basile, or her successors in title, would be permitted to build. (*Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992); *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158 (1992)) The Court of Appeals declined to apply the rule because Mrs. Basile acquired the property after the wetlands regulations were enacted.

The Town cites *Michigan v. Long,* 463 U.S. 1032 (1983) for the proposition that this Court has no jurisdiction to hear this case. (O.B. pp. 14-15) It neglects, however the part of the decision which states:

> "In more recent cases, we have ourselves examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached" (463 U.S. 1038)

and concluded that:

> "dismissal is inappropriate 'where there is strong indication...that the federal constitution as judicially construed, controlled the decision below.'"

If the Town's argument were correct, neither *Lucas*, nor *Nollan*, nor *Pennsylvania Coal Co. v. Mahon* could have reached the Supreme Court. All of these dealt with the same

kind of state or municipal regulations as in the instant case. The same is true of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978) and *Lopes v. City of Peabody*, ___U.S.___, 113 S.Ct. 1574 (1993).

Mrs. Basile claimed a value based on the fact that the State and Town restrictions violated the federal constitution as applied to her property. The Court of Appeals said, that Mrs. Basile did not have that constitutional right because the regulations redefined background principles of property law. If the Town is right, all any state need do to deny jurisdiction to this Court is pass a law that redefines property rights, and apply that law, whether or not it violates provisions of the federal constitution.

III

RESPONDENT'S ARGUMENT THAT THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH DECISIONS OF ANOTHER STATE COURT OF LAST RESORT, A UNITED STATES COURT OF APPEALS OR THIS COURT IS INCORRECT

The Town argues (O.B. 24) that, "*Lopes v. City of Peabody*, 417 Mass. 299, 629 N.E.2d 1312 (Mass. 1994) stands for the wholly unremarkable proposition under Massachusetts Law, a property owner is entitled to challenge a pre-existing land use regulation." It ignores the fact that the decision was rendered only after the case was remanded by this Court (___U.S.___, 113 S.Ct. 1574) on the basis of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), supra, the intermediate appellate court having held that Mr. Lopes had no standing to challenge the

constitutionality of the Massachusetts law because he had bought the property six years after the regulations were in place. (32 Mass. App.Ct. 1124, 595 N.E.2d 812)

What is remarkable is that the Town can try to distinguish that case from the instant case when they are almost identical and the New York Court of Appeals held, "Enactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations... Since claimant took title to her property subject to wetlands regulations and the encumbrances of certain covenants, she cannot claim the value of the property without such restrictions." (p. A-3 of Petition)

If the Lopes decision were the only one which conflicts with the Court of Appeals decision in the instant case, that should be sufficient. However, Mrs. Basile cited three others in her petition. The distinction the Town makes (O.B. 23) that the instant case is in the context of a condemnation case and the four cases cited are not, is a distinction that escapes us.

The Town, trying to distinguish *Moroney v. Mayor*, 268 N.J. Super. 458, 633 A.2d 1045 (1993) states (O.B. 26) that *Moroney* turned on specific language of the zoning provisions in issue which, the Town says, expressly provided that the right to apply for a variance passes to a successor in title. That is not true. Nowhere in the decision does the New Jersey court make reference to any such zoning provision. The decision relied on the fact, as we do here, that the constitutional right to challenge any restrictive regulation that denies an economically viable use is not lost upon the transfer of the property to another. Although not decided by the highest court in New Jersey, that court declined to review the case (136 N.J.

295, 642 A.2d 1004 (1994)) leaving the decision as the law in New Jersey. Hence, the conflict.

The Town argues that in *Vatalaro v. Department of Environmental Regulation*, 601 So.2d 1223 (1992), "the Court never held as a general rule that the denial of a building permit to one who purchases after restrictive regulations have been adopted is a taking requiring compensation." (O.B. 26) Mrs. Vatalaro bought after restrictions were in place and was, therefore, denied a permit. The Court said:

> "In the case at bar, all economically viable use of the property has been taken. A home cannot be constructed on it, or anything else for that matter. The language used in denying the permit makes it clear that use of the subject land is limited to just looking at it. Apparently even walking across the land is destructive to its delicate balance, as the construction of a boardwalk was suggested. This result falls within the contemplation of the cases finding a taking where all economically viable uses of the property has been prevented." (608 So.2d 1229)

As with the Vatalaro case, Petition for Review by Florida's highest court was denied, leaving this decision as the law of Florida.

In *K & K Construction, Inc. v. Department of Natural Resources*, 217 Mich.App. 56, 551 N.W.2d 413 (1996), the time to appeal had expired when Mrs. Basile's Petition was submitted. We have learned since that a late leave to appeal has been granted by Michigan's highest court. This now becomes a compelling reason to grant the Petition so that

direction, on this issue, can be given to Michigan and other states.

Although it involves a direct invasion, rather than a regulatory taking such as we have in the Basile case, the same principle was recited in *Presault v. U.S.*, 100 F.3d 1525 (1996). There the United States Court of Appeals, Federal Circuit, wrote an opinion in direct conflict with the decision of the New York Court of Appeals in the instant case.

The Town cites the decisions of several states that are "in perfect harmony" with the decision of the New York Court of Appeals in the Basile case. (O.B. 22, 23) Accepting the Town's apparent representation that all of these cases involve regulations that destroy all economically viable uses on the properties involved and that there were no other factors that influenced these decisions, these enlarge our position that, as against the decisions in New Jersey, Massachusetts, Florida, Michigan and the Federal Circuit of the United States Court of Appeals, there is a conflict between these jurisdictions which, we respectfully submit, should be resolved by this Court.

CONCLUSION

The New York Court of Appeals held that the State and the Town redefined property rights while the property was in the hands of Mrs. Basile's predecessor in title. Therefore, although he retained those rights, they were lost when the property was transferred to Mrs. Basile. In fact, they were not lost but transferred by State and Town law, to the State and Town without just compensation. If the decision of the New York Court of Appeals is allowed to remain the law of the State and of any other State that decides similarly, all any State need do is pass a law that redefines property rights and thereby

acquire them. This would be a nullification of the takings clause of the Fifth Amendment and of this Court's long line of decisions in regulatory takings cases since 1922.

Therefore, Petitioner, Dorothy A. Basile, respectfully urges the Court to grant the Petition for Writ of Certiorari.

Dated: NewYork, New York
July 3 , 1997

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